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VOL. 73-INDIANA REPORTS.

45

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45-

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

BY FRANCIS M. DICE,
OFFICIAL REPORTER.

VOL. 73,

CONTAINING CASES DECIDED AT THE NOVEMBER TERM,
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. WILLIAM E. NIBLACK.*†

HON. GEORGE V. HOWK.††

HON. JAMES L. WORDEN.‡

HON. BYRON K. ELLIOTT.§

HON. WILLIAM A. WOODS.§

*Chief Justice at the November Term, 1880.

†Chief Justice at the May Term, 1881.

‡Term of office commenced January 1st, 1877.

§Term of office commenced January 3d, 1881.

SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA.

HON. GEORGE A. BICKNELL.*†

HON. JOHN MORRIS.†

HON. WILLIAM M. FRANKLIN.†

HON. HORATIO C. NEWCOMB.†

HON. JAMES I. BEST.†

*President at the May Term, 1881.

†Appointed April 27th, 1881.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
***DANIEL T. ROYSE.**
†JONATHAN W. GORDON.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
FREDERICK HEINER.

***Died July 12th, 1881.**

†Appointed July 15th, 1881, to succeed DANIEL T. ROYSE.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1880, IN THE SIXTY-
FIFTH YEAR OF THE STATE.

No. 6111.

HAMILTON ET AL. v. THE CITY OF FORT WAYNE.

CIRCUIT COURT.—*Appeal.*—*Jurisdiction.*—The circuit courts of this State are courts of general jurisdiction, and, where appeals from inferior tribunals are authorized, such courts take cognizance of such appeals, under their general appellate jurisdiction.

SAME.—*Cities.*—*Common Council.*—Under section 66 of the act for the incorporation of cities. 1 R. S. 1876, p. 302, an appeal will lie to the circuit court from the common council of a city, on the assessment of damages in the location of streets.

From the Allen Circuit Court.

W. H. Coombs, J. Morris and R. C. Bell, for appellants.
A. Zollars, for appellee.

NIBLACK, C. J.—In the year 1873 the common council of the city of Fort Wayne passed an ordinance “to open and

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extend Clinton street, from the south line of Lewis street, parallel with Calhoun street, to the north line of Holman street." This ordinance extended Clinton street over lands belonging to the appellants, Andrew H. Hamilton, Emerine J. Hamilton, Montgomery Hamilton, Mary Williams, Margaret H. Hamilton and Ellen Hamilton, and commissioners were directed to assess the damages and benefits which would result to the owners of lands over which the extended portion of such street would pass.

The commissioners, amongst other things, reported that no damages would result to a portion of the lands of the appellants, and the appellants, within thirty days, appealed to the circuit court of the county, where, on motion of the appellee, the appeal was dismissed upon the ground that such an appeal was not authorized by law.

Section 66 of the act concerning the incorporation of cities, 1 R. S. 1876, p. 302, referring to reports made by commissioners in cases like this, provides that "any owner of land, or representative thereof, aggrieved by such report, may appeal therefrom at any time within thirty days after the filing thereof, to any court having jurisdiction of the same, upon filing the usual bond with the city clerk for costs."

The question presented to us is, did this section of the statute authorize the appeal in this case from the common council to the circuit court?

We think it did. The circuit courts of this State are courts of general jurisdiction, and, in addition to their original jurisdiction, they have "such appellate jurisdiction as is or may be provided by law." When appeals from inferior tribunals are authorized, and no express direction is otherwise given, the circuit courts necessarily take cognizance of such appeals, under their general appellate jurisdiction.

Section 66, *supra*, gives an appeal "to any court having jurisdiction" of such appeals, and, for the reasons given, the circuit courts have jurisdiction of the class of appeals to

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which that section refers. Any other construction would destroy the value of the appeal reserved by that section.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

No. 6865.

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73	3
130	106
73	3
135	374
73	3
147	503

JURISDICTION.—*Collateral Attack.*—Where the jurisdiction of an inferior court depends upon a fact which such court is required to ascertain and settle by its decision, such decision is conclusive as against all collateral attacks.

SAME.—*Highway.*—*Petition.*—*Names of Owners of Land Affected.*—*County Commissioners.*—The sufficiency of a petition for the location of a highway, as to the proper designation of the names of the owners or occupants of the lands to be affected thereby, is a jurisdictional fact to be determined by the board of commissioners, and its judgment thereon can not be collaterally attacked.

HIGHWAY.—*Opening of.*—*Statute Construed.*—Under section 15 of the statute providing for the opening of highways, 1 R. S. 1876, p. 531, the petition therefor is sufficient, against collateral attack, if it appears that either an owner, or an occupant, or an agent of the land through which the highway is to pass, was properly named therein.

SAME.—*Notice of Filing Petition.*—*To whom Given.*—*Constitutional Law.*—The Legislature has the power to prescribe what shall be a reasonable notice of the pendency of a petition for the opening of a highway, and whether it may be given to the owner or to the occupant of land affected thereby; and under section 15, *supra*, notice is sufficient if given to either the owner or occupant.

SAME.—*Notice to Remove Fences.*—*Sufficiency of.*—Under section 41 of the statute, *supra*, notice by the supervisor to remove fences on land through which a highway has been located, is sufficient if given to either the owner or occupant.

SAME.—*Admissions of Occupant of Land.*—*Principal and Agent.*—Where an occupant of land has been made a party to the proceedings for the opening of a highway through such land, his admissions as to matters connected therewith are those of a principal, and not of an agent.

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SAME.—Husband and Wife.—Notice to Husband.—Evidence.—In a proceeding to open a highway through lands occupied by a husband and wife, though owned by the wife, it is sufficient to name the husband as the occupant thereof, in the petition and notices, and his admissions in relation thereto are admissible in evidence.

From the Vigo Circuit Court.

R. Dunigan, S. C. Stimson and R. B. Stimson, for appellant.

N. G. Buff and S. M. Beecher, for appellees.

ELLIOTT, J.—The questions requiring our consideration arise upon the issues joined on the answer of appellees, justifying an entry on land of the appellant under an order of the board of county commissioners directing the opening and laying out of a highway.

The contention of appellant is, that the proceedings and order of the board of commissioners were void, and, therefore, afforded no protection to the appellees. The petition filed in the commissioners' court is assailed upon the ground that it is insufficient because it does not state the names, in full, of the land-owners whose lands will be affected by the opening of the highway. The petition describes some of the owners of lands by the initials of their christian names, others are described as "Waldron's heirs," and others as "Bryant's heirs." Doubtless this description would be insufficient upon an objection made before the commissioners, while the petition was pending, or upon an appeal from the order of the board of commissioners; but that is not the question here. This is a collateral attack made upon the judgment of an inferior tribunal, and very different rules prevail from those which obtain in cases where there is a direct proceeding attacking the judgment. The commissioners have passed upon the sufficiency of the petition, and as its sufficiency, in the particulars named, was a question which the commissioners must have determined as a matter necessary to confer jurisdiction, their judgment can not be

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overthrown by an attack of the character of that now made by appellant. It has long been the rule in this State, and, indeed, in a very decided majority of all the States, that where the jurisdiction of an inferior court depends upon a fact which the court is required to ascertain and settle by its decision, such decision is conclusive as against all collateral attacks. *The Evansville, etc., R. R. Co. v. The City of Evansville*, 15 Ind. 395; *The State, ex rel., v. Needham*, 32 Ind. 325; *The Board, etc., v. Markle*, 46 Ind. 96; *Dequinbre v. Williams*, 31 Ind. 444; *The Board, etc., v. Hall*, 70 Ind. 469. This principle was applied in its full force and broadest scope in *Little v. Thompson*, 24 Ind. 146, where the question arose upon a direct appeal from the judgment of the commissioners. In *Wild v. Deig*, 43 Ind. 455, it was expressly held that, although the names of some of the land-owners were omitted, that fact would not avail one who was named, where the attack was, as here, made collaterally. *Vide*, also, *Miller v. Porter*, 71 Ind. 521.

The defect which appellant points out ought not, in any event, to be considered as of such a serious nature as to invalidate the proceedings. The petition was amendable (*Hedrick v. Hedrick*, 55 Ind. 78, and *Little v. Thompson*, 24 Ind. 146), and ought, in such an attack as the present, to be deemed sufficient, irrespective of the effect of the judgment pronounced upon it by the board of commissioners.

The appellant asserts that the proceedings of the board of commissioners were invalid because she was not named in the petition, and was not notified of the pendency of the proceedings. It is very satisfactorily shown, however, that her husband, Joseph Porter, was named in the petition, and that he was the occupant of the land entered upon, and was also the agent of the wife. The appellees meet the argument of appellant by the proposition, that it is sufficient to name and notify the occupant or the agent, without notifying the owner. The language of the statute upon which the

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question turns is as follows: "Whenever twelve freeholders of the county, six of whom shall reside in the immediate neighborhood of the highway proposed to be located, vacated, or the change to be made, shall petition the board of county commissioners of the county in which such highway is situated, setting forth in such petition the beginning, course and termination of the highway proposed to be located or vacated, or of the change proposed to be made, together with the names of the owners, occupants or agents of the lands through which the same may pass," the board shall appoint viewers. What is the construction to be given the clause, "shall set forth the names of the owners, occupants or agents"? If it means that all owners, all occupants and all agents must be named; then, as the appellant was not named in the petition, she can not be regarded as a party to the proceedings which resulted in the order or judgment under which appellees justify. If she was not a party, and if the statute required that she should be made a party by being named in the petition, then she can not be held to have been concluded by the judgment pronounced by the commissioners. The general rule is, that where the law requires that owners shall be made parties to judicial proceedings, and they are not brought into court in the manner prescribed by law, they are not concluded by the judgment; and this is so whether the court be one of general or limited jurisdiction. The important question, therefore, is, does the statute require that the owner shall be a party, and that he shall be made a party by being named in the petition? It seems to us that the language of the statute will not bear the construction that all owners, all occupants and all agents should be named in the petition; but that the only reasonable construction is, that it is sufficient if either the owner, the agent or the occupant be made a party. The language plainly indicates this, for, in legal effect, it is precisely the same as if the words were, "shall set forth the names of the owners, or

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the names of the occupants, or the names of the agents.” Unless we do violence to the language used, we must hold that the statute requires that one of the three persons designated, the owner, the occupant or the agent, shall be named, but that it does not require that the owner of, the occupant of, and the agent for, the same land shall all be named in the petition. We must, however, accept one of two alternatives, for we must hold that all owners, all occupants, and all agents shall be named in the petition, or we must hold that it is sufficient to name one only of the three, an owner, an occupant, or an agent. This construction is obviously the only one of which the statute will admit, and will commit to the commissioners the power of determining the question, whenever proper steps are taken to raise it, which one of the three is the proper party in the particular case. If this be so, then the case falls within the rule, that where an inferior tribunal has power to decide upon jurisdictional facts, and does decide, its judgment can not be overthrown in a collateral proceeding.

The appellant asks us to examine the cases referred to by her counsel, and we have done so with care. The case of *Wright v. Wells*, 29 Ind. 354, is against, rather than for, the appellant, the court there holding that the judgment of the board ordering the opening of the highway was conclusive upon the jurisdictional facts. *Hays v. Campbell*, 17 Ind. 430, was an appeal from the judgment of the commissioners, where the single question was whether the petition was sufficient where the owner was not named, and no question was made as to what would have been the effect had the occupant of the land been named. *Hughes v. Sellers*, 34 Ind. 337, is essentially the same as *Hays v. Campbell*, and requires no comment further than to say that it does not touch the question we have immediately in hand. Both of these cases are considered in *Wild v. Deig*, 43 Ind. 455, and from the language there used it is evident the court did not consider

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that they applied to the case, where the question came up in the course of a collateral attack. The case of *Crossley v. O'Brien*, 24 Ind. 325, was also an appeal from the judgment of the commissioners, and no such question as we are now dealing with arose in that case. It must be said that much that is stated in that case, by way of illustration and argument, can hardly be harmonized with the more recent cases; but, however this may be, it is quite certain that it does not apply to the question which the present case thrusts upon us. None of the cases cited by appellant shed much light upon the question, for in all of them the question of the sufficiency of the petition arose upon appeal from the judgment of the commissioners' court, and the distinction between an attack made by direct appeal and one made in a collateral manner is very obvious and important, and has been recognized in very many cases. *Suits v. Murdock*, 63 Ind. 73, and authorities cited. Nor do we receive much assistance from the authorities cited by appellees. The only case which approaches the present question is that of *Meyers v. Brown*, 55 Ind. 596, and the point there decided was, that it is not necessary that the petition should state who are owners and who are occupants, but that it will be sufficient if all proper parties are named. The case does, indirectly, lend some support to the appellees' argument, but does not fully meet the question argued.

The precise question now presented is, therefore, a new one in this State. We think, however, that the language of the statute itself, as well as the holding of the courts upon similar questions, requires us to hold that a petition for the opening of a highway is sufficient, as against a collateral attack, if it appears that either an owner, an occupant or an agent was properly named and notified. If it be sufficient to name one of the three, and one is named, and the commissioners have decided that the proper one was named, then the case comes directly under the rule, already stated, that

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where a court is required to decide, and does decide, upon a jurisdictional fact, its judgment can not be overthrown in a collateral attack.

It is clearly within the power of the Legislature to provide the form of notice, as well as the time and manner of giving it. There are, indeed, cases going so far as to hold that it is not essential that any notice at all shall be given. Upon this subject a late writer says: "The condemnation proceedings being in the nature of proceedings *in rem*, the judgment is conclusive against every party interested, whether notified or not. The seizure is constructive notice. The court obtains jurisdiction over the land seized. Public convenience would not allow proceedings to be set aside for want of notice to individuals. The notice may be given to the party in possession, although he may not be the true owner." Mills Eminent Domain, sec. 94.

We are, however, not now required to do more than decide whether the Legislature may declare notice served upon an occupant of land to be sufficient, and whether that is the declaration of the present statute. We do decide that the Legislature has the power to prescribe what shall be a reasonable notice of the pendency of a petition for the opening of a highway, and whether it may be given to the owner or to the occupant of land, and that they have declared that it is sufficient if given to either the owner or to the occupant.

Appellant argues at much length that she was entitled to notice to remove her fences before any entry upon her land could be rightfully made. We think that notice is required. *Suits v. Murdock, supra*; 1 R. S. 1876, p. 534, sec. 41. But we do not think that it must be given to the owner, and that it can be given no one else. The provision of the statute is: "The supervisor shall give the occupant of such land, or the owner, if a resident of the road district, sixty days' notice." There can be no doubt as to the meaning of this statute; the notice may be given to either the owner or to the occupant. There is

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no reason for assigning to the conjunction *or* any other than its ordinary meaning. There is no obscurity, no confusion, and we have no right, therefore, to alter a word or to twist it from its usual and ordinary signification.

Statements made by Joseph Porter were admitted over the objection and exception of appellant, and it is now claimed that in this there was error. The competency of these admissions does not, as counsel suppose, depend solely upon the question whether the said Joseph was the appellant's agent. As the statute provides that the occupant of land may be the party to the petition, and that upon him notice to remove may be rightfully served, he is, as to all these matters, a principal. His admissions upon all such matters are those of a principal, and not those of an agent. If, however, this were not the rule, there is so much evidence tending to establish the fact of agency, and the further fact that the declarations of Joseph were within the scope of such agency, that we could not disturb the verdict, even upon the theory that Joseph's declarations were competent only upon the ground of agency.

We find no error in the record which will warrant a reversal, and the judgment must, therefore, be affirmed.

Judgment affirmed, at costs of appellant.

Petition for a rehearing overruled.



73	10
137	350

No. 9345.

ELLIOTT v. THE STATE.

LIQUOR LAW.—*License.*—*Verdict.*—*Fine.*—*Discretion of Jury.*—*Supreme Court.*—The amount of a fine for selling liquor without license is not exceeding the statutory limit, within the discretion of the jury, and the Supreme Court will not disturb a verdict on account of its amount.

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SAME.—*Competency of Juror.—Belief.—Prejudice.—Cases Distinguished.*—

Where, on empanelling a jury to try a person indicted for violating the liquor law, a juror, on examination as to his competency, states that he has a prejudice against the sale of intoxicating liquors, and believes such business, though legitimate, immoral and improper, but thinks he can waive his prejudice so as to do the accused justice, and try him as freely as he would a person for the violation of any other law, he is not thereby disqualified to sit as a juror on such trial. *Keiser v. Lines*, 57 Ind. 431, and *Swigart v. The State*, 67 Ind. 287, distinguished. WORDEN, J., dissents.

JUROR.—*Competency of, how Determined.—Discretion.*—Although a juror, who has expressed an opinion as to the guilt or innocence of the accused, is incompetent, yet he may be competent, if he can give an unbiased hearing and verdict according to the law and the evidence adduced; and it is left to the sound discretion of the trial court to say whether, for such cause, the juror is disqualified.

SAME.—A juror's opinion as to the morality of a particular transaction can not be considered in determining his competency to try one accused thereof.

SAME.—*Opinion Concerning Collateral Question.—Supreme Court.*—How far enquiry shall be made of a juror concerning his opinion of the morality of any pursuit or business of the accused, and for what opinions in respect thereto he shall be set aside, are matters in the discretion of the trial court, and its decision will not be overruled by the Supreme Court unless it is shown that there has been an abuse of that discretion.

From the Henry Circuit Court.

M. E. Forkner, for appellant.

D. P. Baldwin, Attorney General, *C. M. Butler*, Prosecuting Attorney, and *W. W. Thornton*, for the State.

WOODS, J.—The appellant, who was keeping a drug store, but had no license to sell intoxicating liquors in quantities less than a quart, was indicted, convicted and fined seventy dollars for a sale made in violation of the license law. The evidence is in the record, and no question is, or can be, made of the appellant's guilt as charged; but we are asked to reverse the judgment because, as is claimed, the fine is excessive, and because of alleged error of the court in overruling the peremptory challenge of the appellant to certain jurors.

The amount of the fine was within the discretion of the jury, and we can not disturb their verdict for that cause.

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One of the jurors who tried the cause, on examination as to his competency, testified as follows :

“I have a prejudice against the sale of intoxicating liquors.

“Ques. Do you believe that the sale of intoxicating liquors is a legitimate, proper and moral business?

“Ans. I think it legitimate, but an immoral and improper business.

“Ques. Would you feel as free to try a person charged with the violation of the liquor law, as you would to try a person for the violation of any other law?

“Ans. Circumstances being equal, I think I would. I think I could waive any prejudice so as to give a man justice.”

The question presented for decision is, whether a man who is prejudiced against the sale of intoxicating liquors, and believes the business of selling such liquors, though legitimate, to be immoral and improper, but thinks he can waive his prejudice so as to do the accused justice, and try him as freely as he would try a person charged with the violation of any other law, is disqualified from sitting as a juror on the trial of one accused of violating the liquor license law?

Counsel for appellant claims that the question has been already adjudicated by this court, and cites *Keiser v. Lines*, 57 Ind. 431, and *Swigart v. The State*, 67 Ind. 287.

In the former case, the question in issue was whether an application for a license should be granted, and, answering directly to the issue to be tried, the proposed juror said he was “opposed to granting license to any person, under any circumstances.” The incompetency of such a juror, in such a case, is too plain for debate ; but the case affords no analogy to the case under consideration. *Swigart v. The State* is more nearly in point, but is distinguishable. In that case the juror declared, not only his belief that the business of liquor-selling was immoral, but that he “Never thought it a

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legitimate business, although the law did grant it." That man either had a confused idea of the meaning of his own words, or else deemed himself bound by a higher law in reference to the subject than the law of the land, and was hardly a competent juror in the case.

Some statements in the reasoning, by which the writer of the opinion reached the conclusion announced in that case, go further than was necessary, and, if adopted as a rule of practice, would lead to unwarrantable results. It is true, as there said, that the "law is uniform, and binds all;" and it may be true that "the moral sense is as variable as the difference between human beings, and binds no one but the individual." If the latter proposition be true, it is proof of the wisdom of the law which has not attempted to found a rule of competency of jurors on so variable a standard, any more than upon other individual differences, or idiosyncrasies of belief or character.

The right to challenge jurors for cause in criminal trials is statutory, and is allowed in the following instances:

1. If any one is placed on the jury by his own or another's request.

2. "No alien may be called as a juror."

3. "When the jurors are called, each may be examined on oath by either party, whether he has formed or expressed an opinion of the guilt or innocence of the defendant, and, upon such examination and other questions put by leave, the court may determine upon the competency of the juror. Any juror is incompetent who has formed or expressed an opinion of the guilt or innocence of the defendant."

4. "If the offence charged be punishable with death, any person entertaining such conscientious opinions as would preclude his finding the defendant guilty, shall not serve as a juror." 2 R. S. 1876, pp. 392-3, secs. 80 to 85.

With these exceptions, any person, who is either a house-

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holder or a freeholder and a qualified voter in any county of the State, is qualified to serve as a petit juror in any court in such county, and, if disinterested, is a competent juror in any case to be tried in such court.

The unqualified statutory declaration is, that a juror is incompetent who has expressed an opinion of the guilt or innocence of the accused ; but, notwithstanding this, it is well settled that one who has both formed and expressed such opinion may be competent, if he can give an unbiased hearing and verdict, according to the law and the evidence adduced ; and whether he can do so must be determined by the court, upon the declared belief of the juror, and such pertinent facts as may be elicited on his examination. *Scranton v. Stewart*, 52 Ind. 68 ; *Hart v. The State*, 57 Ind. 102 ; *Coryell v. Stone*, 62 Ind. 307 ; *Guetig v. The State*, 66 Ind. 94 ; *Brown v. The State*, 70 Ind. 576. See *Balbo v. The People*, 80 N. Y. 484.

The expression of an opinion upon the guilt or innocence of the accused goes directly to the issue to be tried, and yet, notwithstanding the strong language of the statute, it is left to the sound discretion of the trial court to say whether, for such cause, the juror is disqualified. Still more must it be in the discretion of the court whether to allow a challenge upon grounds not expressly mentioned in the statute, and concerning which questions can be put to the juror only "by leave" of the court.

If the juror is free from bias or prejudice on the question of the defendant's guilt of the particular offence charged, he must be of weak mind indeed if he can not fairly try that question, notwithstanding any views entertained of the morality or propriety of some line of business in which the defendant may or may not have been engaged.

A juror's opinion of the morality of a particular transaction certainly can not be considered in determining his competency to try one accused thereof. If so, jurors could not

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be found to try those charged with murder, arson, rape, or any of the crimes which are *mala in se*. All good men, and most bad men, are prejudiced against such acts, and deem them improper and immoral. But, as to those things which are *mala prohibita*, offences only because forbidden by statute and not generally deemed illegitimate unless so condemned, the opinions of men widely differ, some esteeming particular laws and the punishments prescribed for their violation proper and necessary to the public welfare, while others think them needless, unjust and improper invasions of private and individual liberty. The license law itself some think wrong, because they deem the liquor traffic immoral and improper to be licensed; while others, perhaps, condemn such laws as an unwarrantable interference with individual enterprise and freedom of action. Others occupy various intermediate positions between these; but it is a needless refinement of argument to presume that the holder of any of these views would, on account of his conscientious scruples, be exposed to impalement "on one horn or the other of the dilemma," if required to try the question of some one's guilt of an alleged infraction of the law. In fact, the juror's belief about the morality of the liquor traffic has no direct bearing upon, and is entirely collateral to, an inquiry into the fact of an alleged infraction of the license law; and, if he is able, on his oath, to say that he can do the defendant justice, and satisfies the presiding judge of his competency, it is not for this court to revise the ruling so made, upon a speculative possibility that the conscientious scruples of the juror concerning a collateral question, entirely severable from the issue to be tried, may prove an embarrassment strong enough to affect his regard for his oath to try and determine that issue according to the law and the evidence. It would be a queer conscience which could so operate. The law will not presume such results. The compe-

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tency of jurors must be determined by practical standards, and not by speculative theories or conjectures.

If those who believe in the immorality of any trade or pursuit are incompetent, as jurors, to try one charged with an infraction of a law concerning that business, then those who think that the business should not be regulated or restricted by law, but should be left as free as other pursuits, should also be deemed incompetent. In some places, it has been found expedient to license and regulate by law the keeping of houses of prostitution; would a juror be incompetent to sit on the trial of one charged with the violation of some penal provision of such a law because he believed the keeping of such houses to be an improper and immoral business, though conceded to be made legitimate under the law? The question is answered by the asking.

In *Balbo v. The People, supra*, the court said, that "The fact that the juror may have had some prejudice against the Italian race was not, we think, a disqualifying circumstance. An opinion that the prisoner's character was bad is not a ground of principal challenge. *The People v. Lohman*, 1 N. Y. 379; *The People v. Allen*, 43 N. Y. 28. The fact that the juror did not like the race to which the prisoner belonged was quite too inconclusive to justify a finding that he was incompetent."

Examples might be multiplied, showing the impracticability of any such test of competency as is contended for.

The suggestion made in *Swigart v. The State, supra*, that, in capital cases, jurors may be challenged if they have conscientious scruples against inflicting the death penalty, has little, if any, force, because the statute expressly provides for the challenge on that ground. Besides, the scruples of the juror in such case go directly to his ability to act. They are "such conscientious opinions as would preclude his finding the defendant guilty." The rule is a practical one, and easily applied.

Stott v. Harrison.

We do not say that there are, or may not be, instances of jurors so prejudiced in reference to matters collateral, but nearly related, to the issue to be tried, as to be incompetent; but how far inquiry shall be made of a juror concerning his opinion of the morality of any pursuit or business of the accused, in the conduct of which the alleged offence may have been committed, and for what opinions in that respect he shall be set aside, must be left, in the first instance, to the discretion of the judge who presides at the trial, and his decision will not be overruled unless it appear that there has been an abuse of that discretion. It does not so appear in this case.

Judgment affirmed, with costs.

WORDEN, J., dissents, thinking that the juror was shown to be incompetent.

No. 7851.

STOTT v. HARRISON.

NEGLIGENCE.—Attorney.—Notary.—Chattel Mortgage.—Damages.—Contract.—Where an attorney who is a notary undertakes and agrees, for a consideration, to draw a chattel mortgage and to make certificate of the acknowledgment of its execution, and also agreed to deliver such mortgage, without additional compensation, to the recorder of the county for record, within ten days from its execution, and cause the same to be recorded, for failure to perform the latter undertaking, whereby the lien of said mortgage is lost, he is liable for the damages sustained by reason thereof; and, in an action for such failure, the averment and proof of the former undertaking are pertinent.

SAME.—Failure to Affix Notarial Seal.—The failure of such notary to affix his seal to such acknowledgment, it being his duty and within his power to do so under his employment, is no defence to such action.

SAME.—Measure of Damages.—Price of Property Sold on Execution not Conclusive on Stranger as to Value.—In such action, the amount for which such mortgaged property was sold on execution is not conclusive as to its value against the plaintiff, who was a stranger to such writ.

Stott v. Harrison.

CONSTABLE.—*Return on Execution.—Authentication.—Evidence.*—Where the return on a writ of execution is made by a constable on the back of such writ, a part in one column and a part in another, with the indorsements of the justice on the writ between, and the constable's name subscribed at the bottom of the left-hand column, such subscribing is a proper authentication of the whole of such return, and such writ is admissible in evidence.

From the Gibson Circuit Court.

R. M. J. Miller, for appellant.

W. M. Land, for appellee.

WOODS, J.—Action by the appellee against the appellant, on a complaint showing the following facts :

The plaintiff was liable, as surety for one Sylvester B. Jones, on a promissory note for one hundred and forty dollars, and said Jones, having agreed to execute to the plaintiff a mortgage on certain growing wheat to secure him against loss on account of his said liability, they employed the defendant, who was an attorney and a notary public; and the defendant, on said employment, undertook and agreed, for a reasonable reward in that behalf, to draw up said mortgage and take the acknowledgment of said Jones thereto, in such manner as to make the same a valid and legal lien on said property, in favor of the plaintiff; and the defendant did accordingly draw a mortgage, which was duly signed and acknowledged by said Jones, and appended thereto his certificate of such acknowledgment as a notary public; that thereupon, to wit, on the 5th day of February, 1877 (the day on which said mortgage was executed), in consideration that he, plaintiff, did then and there deliver said mortgage to the defendant, to be by him delivered to the recorder of Gibson county to be recorded, the defendant undertook and promised, without reward in that behalf, to deliver the same to said recorder, and cause the same to be recorded within ten days from that time; that, though the defendant then and there received said mortgage of the

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plaintiff for the purpose aforesaid, yet, not regarding his said promise and undertaking, he did not, and would not, deliver said mortgage to the recorder and cause the same to be recorded within ten days of said date, but so carelessly conducted himself in that respect that said mortgage was not delivered to the recorder for record until the 16th day of February, 1877, by reason whereof the lien of said mortgage became lost, and said property was seized and sold as the property of said Jones on an execution junior to the date of said mortgage, and the proceeds of the sale applied upon said writ; that said mortgaged property was worth two hundred dollars; that said Jones was and is insolvent, and possessed of no property subject to execution; that the plaintiff was compelled to pay, and did pay, upon said note whereon he was surety for said Jones, the sum of ninety dollars, which has never been repaid by said Jones, or otherwise.

Answer in general denial; trial by the court; finding and judgment for the plaintiff.

The only error assigned is upon the overruling of the appellant's motion for a new trial.

The appellant claims that the verdict is contrary both to the law and the evidence, and, in support of this proposition, contends that the gist of the complaint is the failure to deliver the mortgage for record, and that the averments concerning the appellant's employment to draw the mortgage, and take the acknowledgment of its execution, are surplusage and play no part in the case; and that, as there was no notarial seal attached to the certificate of acknowledgment, the recording of the mortgage would have been a nullity, and that the plaintiff had, therefore, not been injured by his alleged negligence in not having the mortgage recorded in time.

The mortgage and the certificate of acknowledgment, and the indorsement of the recorder of the county, showing that the instrument had been received for record on February

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16th, 1877, were, as it appears by the bill of exceptions, put in evidence without objection, and no suggestion of the defect seems to have been made in the court below. Under the circumstances, it is doubtful, to say the least, whether this court can be called on to say that there was no impression of a seal merely because the clerk has indicated none on the transcript. See *Brooster v. The State*, 15 Ind. 190; *Stevens v. Doe*, 6 Blackf. 475; *Jordan v. Corey*, 2 Ind. 385; *Beardsley v. Knight*, 4 Vt. 471.

If, however, it were conceded that the acknowledgment now under consideration was defective for the want of the notarial seal, the conclusion contended for by the appellant does not follow. The gist of the complaint is not simply that the appellant undertook to deliver the mortgage to the recorder for record, but also to cause the same to be recorded; and in this connection it is not without significance that the appellant, an attorney and notary, for a consideration, on the employment of the plaintiff and said Jones, drew the mortgage, and took and made a certificate of the acknowledgment thereof. If in truth he had not stamped the certificate with his official seal, he still had the power to do it (*Jordan v. Corey, supra*), and having undertaken to cause the mortgage to be recorded within the time allowed therefor by law, his failure can not be excused on account of the absence of a seal which he had the power, and was under a double duty to the plaintiff, to attach—a duty arising from the original employment to take the acknowledgment, and also from the undertaking to cause the instrument to be recorded; and, upon the charge of the failure to perform the latter undertaking, the averment and proof of the former are pertinent, and perhaps necessary, under the circumstances, to make the cause of action complete.

Another ground on which it is claimed that a new trial should be granted is that the court erred in allowing certain writings endorsed on the execution on which the wheat was

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sold, or is claimed to have been sold, to be read in evidence as a part of the constable's return on said writ. It is claimed that the part so read was not signed by the constable, and that, aside therefrom, there was a complete return over the signature of the constable. The return, as put in evidence, was identical with a return which was copied into the record of the justice of the peace, which had already been read in evidence without objection; but, aside from this, we are not able to say that the court committed any error in treating the parts objected to as a part of the true return. It was all written on the back of the writ, presumably in one handwriting, a part in one column and part in another, with the indorsement of the justice on the writ between, and the constable's name subscribed at the bottom of the left-hand column. It would be extremely technical to hold that the signature so placed was not a proper subscribing and authentication of the whole. The portions objected to showed the sale of the wheat. There was other evidence of the sale, and no conflict of evidence on the subject.

We can not say that the court awarded excessive damages. The price for which the wheat was sold by the constable was not conclusive on the plaintiff, who was a stranger to the writ, and adversely interested, and there was abundant evidence to show a greater value than the price so obtained.

Judgment affirmed, with costs.

No. 6928.

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DITCHES AND DRAINS.—*Appeal from Board of Commissioners.—Statute Construed.*—The language of the proviso in section 10 of the drainage law of 1875, 1 R. S. 1876, p. 430, "Any party aggrieved may ap-

73	21
135	374
136	523

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peal," gives a general right of appeal from orders entered by a board of commissioners under authority of any section of such drainage law.

SAME.—Under section 31 of the act in relation to the organization of county boards, 1 R. S. 1876, p. 357, any one aggrieved has a right of appeal from the orders of a board of county commissioners in relation to the establishment of a ditch under the act of 1875, *supra*.

STATUTE.—*Rule of Construction.*—In construing the meaning of a statute, courts must look to the intention of the Legislature, apparent from the entire statute, and not to the particular phraseology or location of clauses.

JURISDICTION.—*Presumption.*—Where a court of general jurisdiction exercises jurisdiction, it will be presumed that it rightfully assumed and exercised such authority, unless the record affirmatively shows want of jurisdiction.

SAME.—*Supreme Court.*—*Practice.*—Where a court has jurisdiction of the subject-matter, the record, on appeal to the Supreme Court, must not only affirmatively show the error complained of in the method of getting the particular cause in court, but must also show that the irregularity complained of was brought to the attention of the trial court.

PARTY.—*Assessment.*—Where an assessment is made against land under the drainage law, *supra*, and the owner is named in such assessment, this is sufficient to make him a party to the proceedings, although not named in the petition asking an order for the construction of the ditch, and to entitle him to an appeal from such proceedings.

SAME.—*Name.*—*Initials.*—*Identity.*—Objection to the identity of a person can not be raised for the first time in the Supreme Court, on account of the use of the initial letters of proper names in the assessment made by the commissioners in such proceedings.

SUMMONS.—*Default.*—*Judgment.*—*Record.*—Where a judgment is rendered by default, unless the record shows that summons was issued and served, the judgment will be reversed on appeal.

SAME.—*Appeal in Vacation.*—Where an appeal is taken in vacation from an order of a board of county commissioners, summons must be issued and served upon the adverse parties thereto.

WAIVER.—*Jurisdiction.*—An appearance, to move to have a default set aside upon the ground of want of notice of an appeal from an order of the board of commissioners, does not waive the right to object to the jurisdiction of the court in which such motion is made.

From the Allen Circuit Court.

L. M. Ninde, for appellants.

S. F. Swayne and *P. V. Hoffman*, for appellee.

ELLIOTT, J.—On the 21st day of June, 1876, appellants presented to the board of commissioners of Allen county a

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petition for the construction of a ditch. Bond was filed, notice given, and viewers were appointed. On the 8th day of September, 1876, an order was made, "establishing the ditch as prayed for." There was no appearance before the commissioners by the appellee, and the order was granted without opposition. The appellee filed an appeal bond on the 7th day of October, 1876, with the auditor, and the record was certified to the circuit court. No notice of appeal, nor of the pendency of the action in the circuit court, was given the appellants. On the 29th day of the November term appellants were called, and default entered against them. Appellants moved to set aside this default before judgment was formally entered. This motion was, however, not made until April, 1877.

It is conceded by appellants' counsel that the appeal bond was filed within thirty days after the final order of the commissioners, but it is insisted that the appellee had no right of appeal at all.

Counsel argues that, as there was no appearance before the commissioners, and no resistance of any kind made to the petition, there is no right of appeal. It is contended that section 4 of the act of 1875, concerning the ditching of wet lands, provides for an order from which there is no appeal; and that the right of appeal given in section 10 applies only to the cases provided for by sections 9 and 10. Section 4 is as follows: "Said board of commissioners, at the time set for the hearing of said petition, shall, if they find the provisions of the 2d section of this act to have been complied with, proceed to hear said petition, and if they find such proposed work to be necessary and conducive to public health, convenience or welfare, or of public benefit or utility, they shall establish the same as specified by the report of the viewers."

Sections 9 and 10 are as follows:

"Sec. 9. If any application for compensation or damages

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shall have been made agreeably to the 3d section of this act, the board of commissioners shall order the viewers and reviewers to determine, by actual view of the premises, the compensation or damages sustained by and to be paid to such applicant, which shall be a part of their said report. After the report of such viewers or reviewers shall have been made, the petitioners may discontinue the said proceedings by paying all costs that have accrued up to the time of such discontinuance, and notifying the auditor in writing that they will not further prosecute the same. But no proceeding shall be discontinued unless the notice thereof shall be signed by a majority of the petitioners for such proposed work.

“Sec. 10. Upon the filing of the report of such reviewers, the board of commissioners shall establish such proposed work as described in the report of such reviewers, and shall award to all applicants for compensation or damages the sum reported by such reviewers to be paid to them, and shall order the same paid out of the county treasury; *Provided*, Any party aggrieved may appeal to the circuit court as provided by law for appeal from commissioners.”

It is evident that different orders are provided for, but we do not think that the Legislature meant to confine the right of appeal to one class of cases or orders only. The provision, “Any party aggrieved may appeal to the circuit court as provided by law for appeal from commissioners,” was intended to give a general, not a limited, right of appeal. A clause is not necessarily to be restricted to the section in which it is found, nor to the sections with which it is immediately connected. Courts are to look to the intention of the Legislature, apparent from the entire statute, and not to the particular phraseology or location of clauses. The language of the clause quoted is broad enough to give a general right of appeal, and there is nothing in the context requiring us to hamper it by a limitation or restriction.

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The conclusion we have reached is strengthened by the language of the section which directly follows that containing the clause giving the right of appeal. In section 11 it is declared, that, "If no damage or compensation shall have been claimed, or if no appeal shall have been taken from the action of the board of commissioners," then certain orders shall be made by the board. Two cases are here clearly provided for—one where there is a claim for damages, another where there is an appeal; thus indicating that the right of appeal is not restricted solely to cases where a claim for damages is interposed.

The provision of the commissioners' statute is, of itself, broad enough to authorize an appeal. The language of section 31 is very broad: "From all decisions of such commissioners there shall be allowed an appeal." 1 R. S. 1876, p. 357, sec. 31.

The order of the board "establishing the ditch" is certainly a decision, and, if a decision, the aggrieved party has a right of appeal under the general statute. The clause quoted from section 10 of the ditching statute, by reference, embodies the provisions of section 31 of the commissioners' statute, and thus expressly applies them to all final decisions under the former act. The right of appeal from final judgments of inferior tribunals is one which ought not to be abridged by strict construction, but, on the contrary, should rather be extended, for the provisions of the statute conferring it are clearly remedial.

It is argued that, as the appellee was not named in the petition or notice, he was not a party to the proceeding, and therefore had no right to appeal without filing an affidavit showing his interest in the matter decided. We can not say that such an affidavit was not filed. As the circuit court is one of general jurisdiction, and, as it did exercise jurisdiction, we must presume that it rightfully assumed and exercised such authority. The affidavit was not necessarily a part of the

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record, and we can not, from the silence of the record, infer, as against the action of the trial court, that none was filed. In *Scraper v. Pipes*, 59 Ind. 158, it was held that, where the record was silent, and it did not affirmatively appear by affidavit, that a preliminary step (there the issuing of a summons) was not taken, a motion to dismiss was correctly overruled.

The motion upon which the appellants base this appeal does not attack the default or judgment upon the ground that an affidavit was not filed. That question was not presented to the lower court in any form, and it can not be presented here for the first time. The circuit court did have general jurisdiction of appeals, and of the subject-matter involved in this particular controversy, and it can not, therefore, be correctly said that there was no jurisdiction of the subject-matter. Of course, if there was no jurisdiction of the subject-matter, the appellants could not have waived objection—indeed, could not have conferred jurisdiction by express consent. But, as we have said, there was jurisdiction of the subject-matter; and, if there was any error at all, it was in the method of getting the particular cause into the circuit court. Unless the record affirmatively shows that error, we must, upon familiar rules, sustain the jurisdiction of the circuit court. The cases warrant us in going further; for, unless the record affirmatively shows that the irregularity complained of was brought to the attention of the court below, we can not give it any consideration at all on appeal.

We think that the appellee was a party to the proceedings, although not named in the petition. An assessment was made against his lands, and he is expressly named as one against whose lands an assessment is laid. This made him a party to the proceedings. He must be regarded as a party, or the assessment must be held to be utterly void; for certainly a judgment can not be rendered by the commissioners against one who is not, actually or constructively, a

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party to the proceedings. Evidently the statute did not mean to restrict the application of the term "parties" to such persons only as were named in the petition or notices. The petitioners, by their act, brought the appellee into the proceedings, and they ought not now to be allowed to assert that he was not a party, and thus cut off his right of appeal.

It is argued that, as the appellee is described as F. W. Barthold in the assessment roll, we can not presume that he is the same person who is here the appellee. There is little, if any, plausibility, and certainly no merit, in this argument. The presumption is, and ought to be, in favor of the ruling of the court below; especially so where the appellants, although they had ample opportunity, did not deny that F. W. Barthold was the same person as Frederick W. Barthold. No attempt was made to show that the appeal was taken by one who had no right to take it, and the objection is entirely too late, if it were otherwise meritorious.

It is contended that, as the appeal was taken in vacation, a summons ought to have been issued and served upon the appellants. It does not affirmatively appear, by affidavit or otherwise, that no summons was issued. *Scraper v. Pipes* is cited by appellee as sustaining the doctrine that, where the record is silent, the issuance and service of summons will be presumed. We are unwilling to give that case such an extended application as that claimed for it by appellee. The question in that case arose upon a motion to dismiss the appeal made by the petitioners in a highway case, and is clearly distinguishable from the present. There, the party questioning the right of appeal was seeking to have the appeal dismissed because the notice required by statute had not been given. Here, the party is seeking to have a default set aside in order that he may be allowed to have a hearing upon the merits. In the former case there was still a right to issue a summons, and get the cause properly into the circuit court. In the present there is a final judgment

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which determines the whole controversy forever, unless the appellants can be relieved from the default and judgment against them. The question here involved was not presented in the case cited, and was neither discussed nor decided.

The statute giving the right of appeal provides that, when the appeal is taken in vacation, the appellant shall cause a summons to be issued and served. 1 R. S. 1876, p. 357. The provision is explicit, and allows appeals in vacation only upon condition that a writ shall be issued against, and served upon, the parties whose interests are adverse to those of the party by whom the appeal is taken. Until there has been service of such summons, there is no jurisdiction of the persons of the parties adverse to the parties who prosecute the appeal from the commissioners. There can be no fair debate upon the proposition, that, where notice or summons is required in order to get a party into court, jurisdiction of the person can not be acquired without such notice, except upon voluntary appearance, or by waiver. The only question admitting of doubt or debate is, what is the rule where the record in such a case is silent? We can not receive any assistance from those cases which hold that, where the attack is collaterally made, and the record is silent, jurisdiction will be presumed, for here the attack is made in the most direct method possible. There are, however, cases which declare a rule within which we feel bound to place this case. It was held as early as *Rany v. The Governor*, 4 Blackf. 2, that, where a judgment was rendered by default, the record must show that summons was issued and served, and this general doctrine has been approved again and again. In *Cochnowar v. Cochnowar*, 27 Ind. 253, the question was much discussed, and it was held that, although there was no attempt to set aside the default in the court below, yet, if the record did not show service of process, the judgment must be reversed. We are unable to perceive any difference between the present case and those

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cited. The statute requiring summons to be issued and served is as explicit and mandatory as in cases where an original action is commenced. The only way in which the party adverse to the one who appeals from the judgment of the commissioners can be got into court, is by summons issued and served, and until this has been done the court has not acquired jurisdiction of the person.

It is said by the appellee that the affidavit, filed in support of the motion to set aside the default, does not show that the appellants' cause had any merit. It was not necessary that it should. If it appeared that the court had no jurisdiction of the person, enough was shown to require the default to be set aside, for in such a case there was an entire want of authority to render any judgment at all.

Appellee urges that, as appellants appeared and did not object to the jurisdiction of the court, they waived all objection, and we are referred to *Jelley v. Gaff*, 56 Ind. 331. This position is not tenable, nor is that case at all in point. Appellants asked to have the default set aside upon the express ground that they had not had notice of the appeal, and they did nothing waiving any right to object to the jurisdiction of the court. Their motion was, in itself, such an objection.

Judgment reversed, at costs of appellee, with instructions to set aside the default and judgment, and for further proceedings in accordance with this opinion.

No. 7695.

ROBINSON v. CLEMENT.

BANKRUPTCY.— *Composition.*— *Judgment.*— *Execution.*— *Payment.*— *Deposit.*— *Condition.*— *Rights of Creditor of Bankrupt on Failure to Comply with Compromise Agreement.*— A. recovered a judgment in the cir-

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cuit court against B. Two days thereafter B., upon his petition, was adjudged a bankrupt by the District Court of the United States. A.'s judgment was afterward allowed in full against the estate of B. B. compromised with his creditors, agreeing to pay a certain per cent. of their claims. A. and B.'s assignee, afterward, in pursuance of section 20 of the bankrupt act, fixed the value of the lien of A.'s judgment upon B.'s real estate, leaving a balance upon which B. should pay the percentage agreed upon, which he afterward failed and refused to do, but deposited the same with the deputy clerk of the U. S. District Court, to be paid to A. upon the condition that the said judgment should be finally determined by the Supreme Court of the State, B. knowing that no appeal had ever been taken therefrom. The clerk refusing to pay said sum on demand on account of such condition, A. brought suit to revive the balance of said judgment, and asked for an order for the issuance of an execution thereon against the property of B.

Held, that A. was entitled to execution on his judgment for the unsecured balance due.

Held, also, that an execution on said judgment should only be issued by order of the court rendering the same.

Held, also, that the money left with the deputy clerk was not a payment either to him or to A., but a mere deposit upon a condition.

Held, also, that a creditor of a bankrupt, in the event of the non-payment of the composition according to its terms, is remitted to all the rights which he had at the time the proceedings in bankruptcy were instituted.

From the Vanderburgh Circuit Court.

A. L. Robinson and G. Palmer, for appellant.

C. Denby and D. B. Kumler, for appellee.

NIBLACK, C. J.—In this case, Andrew L. Robinson, the plaintiff, complained of Converse Clement, the defendant, and said that on the 24th day of December, 1874, he recovered a judgment, in the Vanderburgh Circuit Court, against the defendant for three thousand and five hundred dollars, with costs of suit; that afterward, on the 26th day of the same month, the defendant began certain proceedings in bankruptcy in the District Court of the United States for the District of Indiana, at Evansville, by means whereof he was, on the same day, adjudged to be a bankrupt; that on the 4th day of February, 1875, the claim of the plaintiff

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was duly proven against the defendant, in such proceedings in bankruptcy, and the sum of \$3,512.80 was allowed against the defendant's estate in bankruptcy, with security—that is to say, on the supposition that the judgment rendered as above was a lien on the defendant's real estate: that on the 1st day of May, 1875, the defendant made an offer of compromise with his creditors, which was not agreed to by the plaintiff, but was accepted by a sufficient number of such creditors to make it binding upon all, by which he was to be released and discharged from his debts by the payment of five per cent. of the amounts respectively due thereon, within sixty days from that date; that on the 8th day of June, 1875, the plaintiff and James H. McNeely, the defendant's assignee in bankruptcy, by an agreement made between them in pursuance of section 20 of the bankrupt act, ascertained and fixed the value of the lien of the plaintiff's judgment upon the defendant's real estate at the sum of \$1,800, leaving the sum of \$1,712.80, without security, upon which latter sum the defendant should have paid to the plaintiff the amount of five per cent., making the sum of \$85.64; that the defendant had neither paid nor tendered to the plaintiff said sum of \$85.64, or any part thereof, but had refused to either pay or tender any part of the same; that on the 6th day of August, 1875, the defendant, instead of paying the same to the plaintiff, as it was his duty to have done, deposited said sum of \$85.64 with the deputy clerk of the United States District Court, at Evansville, to be paid to the plaintiff upon the condition that his said judgment should be finally heard and settled by the Supreme Court of this State, when in truth and in fact no appeal to said Supreme Court had ever been taken from said judgment, nor had the cause in which it was rendered ever been in any way in that court, which the defendant well knew at the time said sum of money was so deposited; that on the 10th day of August, 1875, the plaintiff applied to the said

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deputy clerk for said sum of \$85.64, and requested that said sum of money should be paid to him, but that said deputy clerk refused to pay the same to the plaintiff, by reason of the condition upon which said money had been deposited with him, as above set forth; that the defendant claimed and pretended that, by reason of the proceedings in bankruptcy, herein above referred to, he is wholly released and discharged from the payment of the plaintiff's said judgment, and every part thereof. Wherefore the plaintiff prayed that his said judgment, as to said sum of \$1,712.80, with the interest which had accrued thereon, might be revived against the defendant, and that execution be issued thereon for the amount found to be due, against the property of the defendant.

The defendant demurred to the complaint, and his demurrer was sustained. The plaintiff refusing to plead further, final judgment was rendered against him upon demurrer.

Only one question is therefore presented, and that is, did the court err in sustaining a demurrer to the complaint?

The appellee urges two objections to the sufficiency of the complaint:

First. That, if the appellant was entitled to an execution on his judgment, he could have procured the issuance of such an execution by a proper application to the clerk, without the necessity of filing such a complaint, and that this proceeding was both unnecessary and unauthorized.

Second. That the facts alleged showed the condition upon which the \$85.64 was paid to the deputy clerk of the United States District Court to have been an utterly impracticable, and hence a void, condition, thereby rendering the payment an absolute one, and conferring upon the appellant a right of action against the deputy clerk instead of the appellee.

In the first place, we think the facts averred in the com-

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plaint made a case upon which it was proper to take the opinion of the court before attempting to proceed further, and in which an execution should only be issued, if at all, by order of the court rendering the judgment, inasmuch as proceedings upon the judgment had been suspended by operation of law. In the next place, we can not agree that the facts averred showed an absolute payment to the deputy clerk for the use of the appellant. The question is a novel one and not free from difficulty, but we feel constrained to construe, and accordingly do construe, the so called payment to have been a mere deposit with the deputy clerk upon a condition which he was not at liberty to disregard, and not in any proper sense a payment, either to the deputy clerk or the appellant.

As to the effect which results from the failure of a bankrupt debtor to pay the amount agreed to be paid on a compromise with his creditors, Blumenstiel on Bankruptcy, at page 451, says: "The creditor, in the event of non-payment of the composition according to its terms, is remitted to the rights which he possessed at the time the proceedings were initiated, so that if he had taken legal steps for the recovery of his debt and the suit had been suspended by the composition, he is to be placed in the same position as he occupied before the settlement was made, and can resume the proceedings, from the further prosecution of which he had been previously restrained."

The rule thus stated by Blumenstiel is well supported by the weight of authority, and appears to us to be decisive of the case in hearing in favor of the appellant. There are cases apparently conflicting with this rule, but, so far as our attention has been called to them, they are based upon a condition of facts different from those presented in this case.

Reason and justice concur in support of the doctrine, that a creditor ought not to be bound by an agreement of composition, which the debtor has failed to perform on his part.

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In re Reiman and Friedlander, 12 Blatchf. 562; *National, etc., Bank v. Porter*, 122 Mass. 308; *Deford v. Hewlett*, 7 Central Law Journal, 149; *Deford v. Hewlett*, 9 Md. 51.

Upon the facts stated in the complaint, we think the appellant is entitled to execution on his judgment for the unsecured balance due upon it.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

No. 7886.

TONEY v. TONEY.

SUPREME COURT.—*Credibility of Witnesses.*—*Presumption.*—*Verdict.*—The Supreme Court can not judge of the credibility of witnesses, and will presume that the verdict is right, where the evidence, though conflicting, tends to support it.

SAME.—*Practice.*—There are cases in which trial courts ought to set aside the verdict of juries; but, if they do not discharge such responsibility, the Supreme Court will not review their action.

DEMAND.—*When Unnecessary.*—Where one disputed his liability to refund the money for which he is sued, no formal demand is necessary.

NEW TRIAL.—*Newly-Discovered Evidence.*—*Diligence.*—Where a new trial is asked on account of newly-discovered evidence, due diligence must be shown to have been used before the trial, and the general statement in the affidavit, that such diligence was used, is not sufficient to overcome the manifest presumptions against its use, arising from all the facts in the case.

From the Cass Superior Court.

R. Magee, for appellant.

S. T. McConnell and *T. J. Tuley*, for appellee.

WOODS, J.—Action by appellee against the appellant to recover the sum of fifteen hundred dollars, which she claimed to have loaned the appellant.

Error is assigned upon the overruling of the demurrer to the complaint, but counsel has pointed out no defect in

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either paragraph, and we have discovered none. There was no error in overruling the motion in arrest of judgment.

It is claimed with earnestness, that the motion for a new trial should have been allowed to prevail, and a number of considerations in support thereof are pressed upon our attention.

The following is an outline of the facts on which the action originated: The appellee had received upon a policy of insurance on the life of her husband, Poindexter Toney, lately deceased, the sum of \$1,500, which she delivered into the hands of the appellant, the brother of said decedent, and administrator of his estate. The purpose of both parties was that the money should be, and it was, used in paying debts of said decedent; but the appellee claims that she gave the money to the appellant as a loan to him, to enable him to pay debts of the deceased on which the appellant was surety; and in fact, to the extent of \$900 or more, the money was so used by the appellant; but he claims that the money was not loaned to him, or advanced on his credit, but was voluntarily put in his hands by the appellee, to be used in paying the debts of said estate, in order to save a sale of the real estate, on which it was contemplated that the appellee should have a lien for the sum so advanced. After the appellant had received and applied said money to the payment of said debts, it was discovered that the deceased, who had been the trustee of his township, was in default in his account as trustee to the amount of \$4,000, which the appellant, as surety on the official bond of the deceased, had to make good, and it became impracticable to save the farm.

Weighed as it appears in the transcript, the evidence seems to preponderate strongly in favor of the appellant; but we can not judge of the credibility of witnesses, and must presume that the verdict was right. There is evidence on which the plaintiff's theory of the case can be sustained, and, that being so, the rule is well settled that this court can

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not interfere with the verdict. There may be, and doubtless are, cases wherein the trial court ought unhesitatingly to set aside the verdicts of juries ; but, if they do not take and discharge the responsibility, this court can not undertake to review their action. We can not know but that the court did its duty, and must presume that it did.

The case is not one where it was necessary to prove a demand ; and, if it were, there was sufficient proof in that respect. It was clearly shown, indeed by the appellant's own testimony, that he disputed his liability to refund the money at all, and this made a formal demand unnecessary, even if otherwise it had been requisite.

One of the reasons for a new trial was the alleged discovery of material new evidence, namely that of Abraham Rinehart ; but it is clear that due diligence was not shown to have been used before the trial. Elizabeth Rinehart testified on the trial to declarations of the appellee, in some respects similar to, and perhaps identical with, those proposed to be shown by said Abraham. Elizabeth was a sister and sister-in-law of the parties, and lived near by. It does not appear but that said Abraham was her husband, or otherwise intimately related, or close neighbor to the appellee, and likely to have had conversations with her in relation to the matters in dispute. The general statements of the appellant in his affidavit, that he had been diligent in making inquiries of such as he deemed likely to know anything in relation to the case, are not sufficient to overcome the manifest presumptions against him, arising out of the suggestions above mentioned.

While by no means convinced that a just result was reached, we find no error in the record on which this court can disturb the verdict and judgment of the superior court.

Judgment affirmed.

The State *v.* Houck *et al.*

No. 9194.

THE STATE *v.* HOUCK ET AL.

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155 533

CRIMINAL LAW.—Nuisance.—Affidavit.—Pleading.—An affidavit and information, or an indictment, for maintaining a nuisance, must show that it was to the injury of some portion of the citizens of the State. A general conclusion, that it is “to the great injury,” etc., “of all the citizens of the State,” is insufficient to supply such defect in the body of the pleading.

From the Henry Circuit Court.

D. P. Baldwin, Attorney General, *C. M. Butler*, Prosecuting Attorney, and *W. W. Thornton*, for the State.

J. M. Brown, for appellees.

WORDEN, J.—Prosecution by affidavit and information against the appellees for a nuisance. Affidavit and information quashed on motion of defendants; exception and appeal by the State.

The affidavit, which was substantially followed by the information, charged “That Thomas Houck and Leonidas Houck, on the 1st day of August, 1880, at said county of Henry and State aforesaid, did then and there unlawfully keep, continue and maintain a certain house, to wit, a slaughter-house, for the purpose of killing and slaughtering cattle, hogs and sheep, said house being then and there situated on the following tract of land in Henry county, to wit:” (description); “and that said Thomas Houck and Leonidas Houck, on the day and year, and at the place aforesaid, and on divers other days and times between that day and the day of the filing of this affidavit, at the place aforesaid, did then and there unlawfully, in and about said slaughter-house, put tripe, entrails, bones and offal of beasts, and did then and there, unlawfully and knowingly, permit and suffer said tripe, entrails, bones and offal of beasts, to be and remain in and about said slaughter-house so kept and maintained by them, the said Thomas Houck

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and Leonidas Houck, for a long period of time, to wit, for the space of one hundred days thereafter ; by reason whereof, divers noisome, offensive and unwholesome smells and stenchs were then and there emitted, so that the air for a great distance around said tripe, entrails, bones and offal of beasts, to wit, for the distance of one-fourth of a mile, was thereby greatly filled and impregnated with the said smells and stenchs, and was rendered offensive, uncomfortable, unwholesome and noxious, to the great injury, annoyance and common nuisance of all the citizens of the State of Indiana then and there residing in the neighborhood of said slaughter-house, and to those passing and repassing said slaughter-house, and that said nuisance ought to be abated.”

In order that a nuisance shall amount to a criminal offence, it must be to the injury of some part of the citizens of the State. 2 R. S. 1876, p. 460. And this fact should be made to appear by the affidavit and information, or the indictment.

It may be observed that the description of the land on which the slaughter-house was affirmed to have been situate, does not indicate that it was in any public place, as upon a town or city lot. Nor does it appear, by the affidavit, that any one resided within the limits of the quarter of a mile, to which extent the air was contaminated. Persons may have resided within the neighborhood of the slaughter-house, but not within the quarter of a mile mentioned. The term “neighborhood” is one of indefinite signification.

There is no direct affirmation in the affidavit, that the slaughter-house was in any public place, if, from such statement, it could be inferred that it was injurious to some part of the citizens of the State ; nor is there any affirmation that any person resided within the limits of the extent to which the air was contaminated ; nor that any person passed or repassed the slaughter-house within the limits indicated. In

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short, no facts are stated to show that any part of the citizens of the State were injured.

The general conclusion, "to the great injury, annoyance and common nuisance of all the citizens of the State," etc., does not supply the defect in the main body of the allegation. *Mains v. The State*, 42 Ind. 327.

The court below committed no error in quashing the affidavit and information.

The judgment below is affirmed.

No. 9028.

HIPES v. THE STATE.

CRIMINAL LAW.—*Pleading.*—*Information.*—*Minor.*—*Billiards.*—In a prosecution for permitting a minor to play billiards, the allegation in the information, "which said billiard table he, the said M. H., then and there being the owner of, and then and there having the care, control and management of," is not a mere recital, but a sufficient averment of the defendant's ownership, and that he had the care and management of the table upon which the game was alleged to have been played.

SAME.—*Affidavit.*—*Jurat.*—*Clerk.*—*Presumption.*—*Signature.*—The signature. J. S. H., clerk, attesting the affidavit upon which such information is based, on appeal, will be presumed to be the clerk of the circuit court.

SAME.—*Judicial Knowledge.*—The circuit court *ex officio* takes notice of its officers and their signatures.

SAME.—*Instruction.*—A defendant, on the trial of such case, is entitled to have a specific instruction given to the jury, applying to the facts of the particular case as developed by the evidence.

SAME.—Where one who has the general management and control of a billiard table is present and allows a minor to play thereon, he is liable to a prosecution, although, at the time, he did not have personal control of such table; and an instruction asked by the defendant limiting his liability to a personal care, management and control thereof, was correctly refused.

73	39
155	390
73	39
166	702

Hipes v. The State.

From the Henry Circuit Court.

M. E. Forkner, C. S. Hernley and H. Brown, for appellant.

D. P. Baldwin, Attorney General, *C. M. Butler*, Prosecuting Attorney, and *W. W. Thornton*, for the State.

ELLIOTT, J.—Prosecution against appellant for permitting a minor to play a game of billiards upon a billiard table, of which appellant is alleged to have been the owner and manager.

It is argued by the appellant that the information is insufficient because it does not aver that the appellant was the owner, or had the care or management, of the table upon which the game was played. The allegation upon this point is as follows: “Which said billiard table he, the said Marshall Hipes, then and there being the owner of, and then and there having the care, control and management of.” We think this is sufficient. The allegation is not, as counsel assert, a mere recital. It is a direct charge that the appellant was the owner of the table upon which the minor was allowed to play.

It is contended by appellant’s counsel, that the affidavit upon which the information is based is insufficient because not attested by a seal. The jurat is as follows: “Subscribed and sworn to before me, this 22d day of January, 1880. John S. Hedges, clerk.” We think that we are bound to presume that the affidavit was sworn to before the clerk of the Henry Circuit Court. The court *ex officio* takes notice of its officers and their signatures, and we must presume that the Henry Circuit Court did take notice that John S. Hedges was its clerk, and that the signature attesting the affidavit was his. *Brooster v. The State*, 15 Ind. 190; *Buell v. The State*, 72 Ind. 523.

Error is assigned upon the ruling denying the appellant’s motion for a new trial, and this assignment and counsel’s ar-

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gument require us to examine the ruling of the court refusing instructions asked by appellant. The appellant asked the court to give the jury the following instruction: "If the billiard tables belonged to the defendant's wife, and he had hired one Listen Allspaugh, for his wife, to take charge of the tables, and he did so, and Hipes had no personal charge or care of the tables, you should find for the defendant, even though the defendant may have been present and [may have seen] the witness William Kinsey playing at the tables." The court refused to give the instruction as asked.

The court, however, on its own motion, gave the following instruction: "This is a criminal prosecution, and to entitle the State to a conviction of the defendant, his guilt must have been proved, as charged in the information, beyond a reasonable doubt. The material averments of the information are, that the defendant, Marshall Hipes, at the county of Henry and State of Indiana, at some time within the two years immediately preceding the commencement of this prosecution, was the owner of, or had the care, management or control of a billiard table, and then and there being such owner, or having such control, management or care, suffered William Kinsey to play a game of billiards on said table with one James Sisemore, and that the said William Kinsey was a minor, under the age of twenty-one years. If you have a reasonable doubt of any one of these material averments, you must acquit the defendant."

The State insists that the instruction given by the court embraces that asked by the appellant, and that there was, therefore, no error in refusing it, even if correct and relevant. This position is untenable. The appellant had a right to ask a more specific instruction than the general one given by the court. It was his right to have a specific instruction, applying to the facts of the particular case as developed by the evidence.

We are, therefore, required to determine whether the ap-

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pellant had a right to have the instruction, asked by him, given to the jury. The instruction asked limits the liability of the appellant to a personal care or charge of the tables, for no other meaning can be justly assigned to the word *personal*, as used in the instruction. The appellant may have been liable, although he had not, *in person*, controlled or managed the table. If he had the general management, and control of the table upon which the game was played, he would still be liable, even though, at the time the game was played by the minor, he had employed some one else to personally manage and control it. It was not necessary for the State to prove that the appellant had personal charge or control of the table; for, if he was the person to whom the owner had entrusted the care and management, it was his duty to have prevented minors from playing, and, if he was present and saw the minor play, he would be liable to a prosecution unless he exercised his general authority to prevent him from playing. One having the general care and management of a billiard table can not evade the law by showing that, at the time the game was played by the minor, he was present, but did not personally control or manage the table. Under the evidence, the instruction asked was rightly refused, because it limited the appellant's liability to a personal care, management and control; whereas he was liable to prosecution if he had the general management and control, although another, at the time the game was played, had been given the immediate personal care and management.

Appellant also complains of the refusal to give the first instruction asked by him, but there was no error in this ruling, because the instruction given by the court fully covered that asked by the appellant.

The evidence fairly supports the verdict. It impresses us, as it doubtless did the jury, that the defence was an attempt to evade the law by proving appellant's wife to be the owner

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of the table on which the game was played, and by showing that, at the time the game was played by the minor, the appellant had procured another to give immediate personal supervision and control. It fully and satisfactorily appears that the appellant did have a general control and management of the tables; for it is clear that his wife, the alleged owner, gave them no actual attention whatever, leaving all matters connected with them to the management of the appellant.

Judgment affirmed, at costs of appellant.

No. 7890.

ROBERTSON v. MEADORS.

LIFE-ESTATE.—Waste, What Constitutes.—Injunction.—The owner in fee of real estate may enjoin a tenant for life from cutting and removing valuable growing timber, to the irreparable injury of the fee simple estate.

SAME.—Life Tenant's Rights.—The extent of a life tenant's rights, in the use of his estate, is not measured by his necessities.

SAME.—Pleading.—Complaint.—Demurrer.—A complaint, by the owner of the fee of real estate, for damages and to enjoin the commission of waste by a life tenant, which alleges the cutting and removal, and threats to cut and remove, valuable growing timber, to the irreparable injury of the fee simple estate, is sufficient on demurrer.

From the Washington Circuit Court.

H. Heffren and *J. A. Zaring*, for appellant.

A. B. Collins and *S. B. Voyles*, for appellee.

WOODS, J.—Complaint for damages and an injunction against the commission of waste. The action was brought by the appellee, as owner of the fee, against the appellant, as owner of a life-estate. A demurrer for want of facts

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was sustained to the second paragraph of answer, and error is assigned upon that ruling alone.

Besides insisting that the answer was good, counsel for the appellant contend that the complaint is not good, and that the demurrer should have been carried back and sustained to that pleading.

After describing the land, and averring the respective interests of the parties, the complaint charges: "That said defendant took possession of said tract of land about the 1st of March, 1871, and has been in possession and occupation of the same ever since, and has the same now under her full control, subject to the rights and equities of this plaintiff; that said defendant, within the last two years, and after the plaintiff became the owner of the fee simple of said lands, and without authority or license from plaintiff, has cut down, hauled off and sold from off said land a large number of walnut, poplar and other timber trees growing on said lands, the number of which plaintiff is unable to state, and during said time she has also committed waste on said land in other ways, all of which has been to the irreparable injury to the fee simple of said lands, producing great injury to this plaintiff; that the defendant has threatened, and is threatening, to cut down, haul off and sell more timber trees from off said land, and otherwise commit waste thereon, for which the plaintiff has no remedy or way to prevent the same, except by injunction or restraining order; that the acts of waste committed by said defendant upon said land during the time said plaintiff owned the fee simple of the same, have been a damage to him of two hundred dollars; that said defendant threatens to continue acts of waste and destruction upon said lands, which, plaintiff believes, she will do unless restrained or enjoined by an order of this court." And that the plaintiff has no other adequate remedy, etc.

The defendant answered by a general denial and a second paragraph, as follows: "For second and additional answer,

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defendant says that she owns for life the land described in plaintiff's complaint, in severalty, by descent, and [as] heir from her husband, John Robertson, deceased; that it consists of about thirty-one acres of land, and was set off to her by commissioners, duly appointed by the court of common pleas of Washington county; that, at the time said lands were so set off, there was only six acres reduced to cultivation, which was entirely inadequate to her support and subsistence; that, for the purpose of obtaining a proper and reasonable support, she caused five acres of said land to be cleared and reduced to cultivation; that she has fenced said land so cleared up, and repaired other fences upon said land, and used and consumed, for necessary fuel, the timber which grew upon said land, save and except ten logs, which grew upon said lands aforesaid reduced to cultivation; that it is and was absolutely necessary for her support and maintenance that said land so described should be reduced to cultivation, and, unless she can use the timber so cut as aforesaid, she will suffer for the necessaries of life, as she has no other means of support whatever."

Trial by the court, and finding and judgment for the plaintiff, awarding thirty dollars damages (amount agreed on) and injunction, as prayed.

The answer seems to have been drawn on the theory that the extent of a life tenant's rights depends on the necessities of such tenant, a proposition which, if authoritatively announced, would be somewhat startling, both to the profession and to the owners of the fee, in such cases. The complaint shows the cutting and removal, and the threats to cut and remove, valuable growing timber, to the irreparable injury of the fee simple estate, and to the plaintiff as the owner thereof, which clearly makes a case of actionable waste, and for injunction. *Dawson v. Coffman*, 28 Ind. 220; *Modlin v. Kennedy*, 53 Ind. 267; *Miller v. Shields*, 55 Ind. 71.

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The answer makes no pretence that the acts already done had not caused the injury charged, and contains no denial of the threats, nor of the alleged purpose to continue the commission of waste and injury as charged.

The point is made, that, if well pleaded, the facts averred in this paragraph of the answer were provable under the general denial, and the further point that the acts of the defendant, set forth in said answer, are not shown to have been the same as those complained of. We need not decide upon these suggestions. Looking to the merits of the plea, aside from technical considerations, it is clear that no error was committed in sustaining the demurrer thereto.

Judgment affirmed, with costs.

 No. 6497.

WALKER ET AL. v. HELLER.

PRACTICE.—*Assignment of Error.*—*Change of Venue.*—*New Trial.*—Alleged error in granting a change of venue must be assigned as cause for a new trial, to present such question on appeal to the Supreme Court.

INSTRUCTIONS.—*Equivalent of "Material Allegations."*—An instruction, that the plaintiff was entitled to recover, "unless the defendant has proved, * * * in substance, the allegations in one or more paragraphs of his answer," is fairly equivalent to saying that, to constitute a defence, it was only necessary to prove the *material* allegations in some one of the paragraphs of answer, and was, therefore, sufficient.

SAME.—*Partial Instruction Supplemented by Another.*—Where an instruction given states the law correctly as far as it goes, but stops short of the full statement of the law applicable to the particular question involved, and such instruction is supplemented by another covering the point omitted, no error is committed.

FORMER ADJUDICATION.—*Lis Pendens.*—*Judgment on Dismissal.*—*Evidence.*—*Appeal.*—*Judgment, Effect of Reversal of.*—*Collateral Attack.*—In an action on a promissory note, record evidence was introduced which showed that a previous suit had been instituted, on the same note, by

73	46
126	330
73	46
155	284

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the plaintiff against the defendants, the makers, M. and W., wherein M. made default and W. made defence, and that the issue formed therein was submitted to the court for trial, and that, after hearing the evidence, the court took the cause under advisement; that, on the next day, the plaintiff, by leave of court, dismissed such action, without prejudice, and thereupon judgment was rendered against the plaintiff for costs, from which W. had appealed to the Supreme Court.

Held, that such record did not establish the pendency of a previous action on the same note, but showed a final judgment, which was in full force at the time of the trial.

Held, also, that the only effect of such appeal was to stay execution on the judgment, and that, in other respects, the judgment was binding upon the parties to it during the pendency of the appeal.

Held, also, that such record evidence did not show a former adjudication of the subject-matter of the subsequent action.

Held, also, that it was the duty of the court to construe such record evidence, and that it was not error for the court to instruct the jury that such evidence was not sufficient to prove either a former adjudication or the pendency of a previous action on such note.

Held, also, that such judgment of dismissal, though made after an announcement, by the court, of its finding, could not be collaterally attacked, and that the fact that it may have been since reversed, does not divest it of the obligatory character it had at the time it was offered in evidence.

SAME.—Stay of Proceeding.—Restraining Order.—If, in such action, W. had, either before answering or going into trial, made a proper application for a stay of proceedings until the appeal in the former action had been determined, he would have been entitled thereto; but, after verdict against him, such application was unavailable.

From the Henry Circuit Court.

W. R. Hough, M. E. Forkner and E. H. Bundy, for appellants.

J. H. Mellett and J. L. Furgason, for appellee.

NIBLACK, C. J.—This was an action by Moses Heller, as assignee of Joseph B. Dunbar, upon a promissory note executed to the said Dunbar by Thomas L. Marsh and Meredith Walker, for one thousand dollars, with ten per cent. interest, and five per cent. attorney's fees in the event of suit upon the note, and was commenced in the Hancock Circuit Court.

Marsh made default; Walker answered in four paragraphs:

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1. The pendency of another action in this court on the same note, and between the same parties, on an appeal from a judgment rendered in such action, by the Hancock Circuit Court.

2. That the plaintiff had, on the 26th day of February, 1875, commenced another action, on the same note, against the defendants, in the Hancock Circuit Court, which action was still pending in that court.

3. That he, the said Walker, had executed the note only as surety for his co-defendant Marsh; that, at and before the time he signed said note, and, as an inducement for him to sign the same, the said Marsh promised and agreed that, before said note should be delivered to the said Dunbar, he, the said Marsh, would procure and have two or three other good and responsible persons, including one Francis T. Chandler, a financially responsible man, to also sign said note as sureties thereon; that the said Marsh, in violation of his said promise and agreement, and without his, the said Walker's, consent, and without procuring any other person or persons to sign the same, delivered said note to the said Dunbar, who, at the time he received the same, had full knowledge of all the facts; that, at the time the plaintiff received said note, and the assignment thereof, he had full notice of the promise and agreement of the said Marsh to procure the names of other persons to be signed to the same, and of his violation of such promise and agreement.

4. That there had been a former action on said note between the same parties in, and a former adjudication of the same matters by, the Hancock Circuit Court.

Issue being joined, the cause was tried in the Hancock Circuit Court, but, the jury failing to agree, were discharged. On the application of the plaintiff, the venue was then changed to the court below.

Upon a second trial, there was a verdict for the plaintiff, and, over a motion for a new trial, and after overruling an

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application by the defendant Walker for a restraining order to stay further proceedings until the cause referred to in the first paragraph of his answer should be decided by this court, the court rendered judgment against both the defendants.

Errors are assigned :

1. Upon the decision of the court granting a change of venue in the cause ;
2. Upon the overruling of the motion for a new trial ;
3. Upon the refusal of the court to restrain further proceedings, upon the application of the appellant Walker.

The first error is not well assigned. The granting of the change of venue ought to have been assigned as a cause for a new trial, if any question was intended to be raised upon it in this court. *Knarr v. Conaway*, 53 Ind. 120.

By the first instruction, given upon its own motion, the court explained to the jury the nature of the action, and told them that the plaintiff was entitled to recover, "unless the defendant (Walker) has proved, by a preponderance of the evidence, in substance, the allegations in one or more paragraphs of his answer."

As an objection to this instruction, it is insisted that it ought to have informed the jury that, to constitute a defence, it was only necessary to prove the *material* allegations in some one of the paragraphs of the answer. The objection appears to us not to be well taken. We think the language used was the fair equivalent of the words which it is insisted ought to have been used, and that the court did not err in giving the instruction.

The second instruction said, in effect, to the jury, that, if the defendant Walker had proved, by a preponderance of the evidence, that he signed the note under the circumstances alleged in the third paragraph of his answer, and that Dunbar had knowledge of those circumstances when Marsh delivered the note to him, without the name of Fran-

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cis T. Chandler, or other additional and responsible parties, thereto, "and that, before he (Dunbar) so sold and assigned the same, he notified said Heller that the defendant Walker had signed and delivered said note to said Marsh, upon the condition that it was to be signed by said Chandler and others before it was delivered or disposed of, and Heller bought said note, having such knowledge, then you should find for the defendant Walker."

The objection urged to this instruction is, that it ought to have informed the jury that, if Heller had knowledge, from any source, of the alleged circumstances under which Walker signed the note, when he took the assignment of it, he was bound by such knowledge. But this objection is also untenable.

The instruction was sufficient, as regards notice to Heller, as far as it went. If Dunbar gave the notice referred to, to Heller, that was enough to sustain the allegation of notice to him contained in the third paragraph of Walker's answer. But the court, by its fifth instruction, told the jury, in substance, that, if Heller had the alleged notice when he purchased the note, without reference to the source from which he received it, the defence as to such notice was complete. The two instructions, therefore, when taken together, covered the whole ground as to notice to Heller, and left nothing unsaid on that subject, of which Walker had any reason to complain.

By its seventh instruction, the court charged the jury, in brief, that the record evidence given under the first, second and fourth paragraphs of Walker's answer, was not sufficient to sustain those paragraphs, and that, as to those paragraphs, their finding should be for the plaintiff.

This instruction is also claimed to have been erroneously given, but, to our minds, no valid reason has been assigned in support of such a claim.

The record evidence, to which the instruction related,

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showed that a previous action had been commenced by the plaintiff, against the defendants, in the Hancock Circuit Court, on the same promissory note; that, in that action, Marsh had made default; that Walker made defence; that the issue formed between him and the plaintiff was submitted to the court for trial; that the court, after hearing the evidence, took the cause under advisement; that, on the next day, the plaintiff came into court and asked leave to dismiss his action, without prejudice, which leave was granted; that thereupon judgment was rendered in favor of the defendants for their costs; that the defendant Walker had appealed from that judgment to this court.

This record evidence did not establish the pendency of a previous action on the same note. It showed that a final judgment had been rendered, which was in full force at the time of the trial. The only effect of the appeal to this court was to stay execution on the judgment. In other respects, the judgment continued to be binding upon the parties to it during the pendency of the appeal. *Burton v. Burton*, 28 Ind. 342; *Randles v. Randles*, 67 Ind. 434.

Nor did this record evidence show a former adjudication of the subject-matter of this action, because the judgment put in evidence by it was not a judgment on the merits of the action in which it was rendered. *Beard v. Becker*, 69 Ind. 498. It was the duty of the court to give a construction to this record evidence, and we see no error in the construction which the court gave to it.

The proceedings on the application of the appellant Walker for a restraining order, upon which error is assigned, did not constitute any part of the action before us, and, hence, can not be considered by us in connection with it. The proceedings upon that application formed a separate and distinct action, demanding affirmative relief inconsistent with the object of the action appealed from in this case. This

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appeal, therefore, presents no question upon those proceedings.

What we have said practically disposes of all the questions discussed by counsel, without disclosing any sufficient reason for a reversal of the judgment.

The judgment is affirmed, with costs.

ON PETITION FOR A REHEARING.

NIBLACK, C. J.—The appellants ask for a rehearing in this cause, and, in support of their petition, reiterate their claim, that the Hancock Circuit Court acted illegally and erroneously in permitting the appellee to dismiss his former action, after its finding had been announced, and that the court below ought to have held the proceedings in that action to have been erroneous when they were put in evidence in this case. This reiterated claim of the appellants entirely ignores the difference between a direct attack upon a judgment by an appeal to this court, and a collateral attack upon it when offered in evidence in another action.

No principle of law is better settled than that a judgment can not be attacked collaterally because of error simply in the proceedings upon which it was rendered. *Evans v. Ashby*, 22 Ind. 15.

The court below had no authority to enquire into the regularity of the proceeding in the former action, further than to ascertain that the Hancock Circuit Court had jurisdiction of the subject-matter of, as well as the parties to, the action. This latter court, having had jurisdiction of the subject-matter of, and the parties to, that action, the judgment rendered in it was obligatory upon the parties when it was read in evidence in this cause, and the fact, that such judgment may have been since reversed by this court, does not relieve it of its obligatory character at the time it was so read in evidence. This court had authority to enquire into

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the regularity of the proceedings of the Hancock Circuit Court, upon a direct appeal from those proceedings, but, for the reasons given, the court below had no such power.

When those proceedings were read in evidence, it then became the duty of the court below to give a construction to the judgment rendered upon them. It was the final judgment, and not some precedent finding or action of the court, that constituted the adjudication between the parties to that action. The judgment did not purport to be, and was not, a judgment upon the merits of the action. Hence, we are still unable to see that the court below erred in the construction it gave to it.

There is, therefore, an essential difference between the question presented in this case upon the proceedings in the former action, and that presented to this court upon an appeal from those proceedings. See *Walker v. Heller*, 56 Ind. 298.

If the appellant Walker, either before answering or going into the trial of this cause, had made a proper application for a stay of proceedings until the appeal to this court in the former action should have been disposed of, he would have been entitled to such a stay of proceedings, but it is not shown that any such an application was made, and no question of that kind is presented by the record.

The application for a stay of proceedings, referred to in the original opinion, was not made until after the verdict was returned against the appellant Walker, and was, in any event, too late to be available.

The petition for a rehearing is overruled.

Knode *et al.* v. Baldrige.

No. 7339.

KNODE ET AL. v. BALDRIDGE.

73	54
135	630

TIME.—*Meaning of Term "Year" in Contracts.*—The term 'year' does not necessarily mean the period commencing with the first day of January and ending with the 31st day of the succeeding December; but its meaning is to be determined from the subject-matter of the contract and the connection in which it is used, and which will carry into effect the intention of the parties.

PARTNERSHIP.—*Receiver.*—*Property.*—*Execution.*—When a member of a partnership dies, and a receiver is appointed who takes possession of the partnership property, no creditor has a right to have such property seized and sold on execution for his own benefit.

PRINCIPAL AND SURETY.—*Promissory Note.*—The statute providing for the levy and sale of a principal's property, before resorting to that of a surety, has no application to cases where such property is in the control and custody of the court.

From the Wayne Circuit Court.

C. H. Burchenal, for appellants.

T. J. Study, for appellee.

ELLIOTT, J.—The assignment of error, which first requires consideration, is that based upon the ruling refusing appellants a new trial.

The material facts established by the evidence may be thus summarized: Robert G. Newcome and Franklin G. Newcome were partners under the firm name of R. & F. G. Newcome, and, by their firm name, executed to Daniel Petty the promissory note upon which the complaint is founded. The note is dated November 9th, 1872, and payable one day after date. Subsequent to the execution of the note, Robert Newcome died. In 1878, after the death of said Robert, the Wayne Circuit Court appointed Andrew S. Higgins receiver of the assets and business of the partnership. The receiver took into possession all the property of said firm, and was in possession thereof at and before the time of the trial of this cause, but there is no evidence as to the amount or value of such assets. After the execution of

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the note, Daniel Petty, the payee, died testate, and Eli Petty and George G. Baldrige were appointed executors; and, after their appointment and qualification, the executors delivered the note in suit to the appellee, Edward R. Baldrige, as devisee under the will of said Daniel Petty. Archibald B. Knodel and George G. Hindman were sureties on the said note. The following endorsements were made on the note:

“November 9th, 1873, rec’d the int. to date, say - \$200
 “Rec’d interest for one year - - - - - 200
 “1875. November 9th, 1875, rec’d interest for one
 year - - - - - 200
 “Rec’d interest for year 1876 - - - - - 200”

There is no evidence showing that Daniel Petty, the payee, knew, earlier than 1874, that Knodel and Hindman were sureties, but in 1874, when the payee’s agent collected the interest, he did know that they were sureties.

Appellants’ contention is, that, when the interest for 1874 was collected, an extension of time was impliedly granted for the term of six days, and the sureties thereby released. As we understand counsel’s argument, it is that the year meant by the indorsement was the time intervening between December 31st, 1873, and January 1st, 1875. The argument is ingenious and specious, but neither meritorious nor sound. The term “year” does not necessarily mean the period commencing with the 1st day of January and ending with the 31st day of the succeeding December. When the word “year” is used, twelve calendar months are usually intended, but not necessarily the twelve months commencing with the first and ending with the twelfth month of the calendar arranged by the statute of George the Second. When the word “year” is used, its meaning is to be determined from the subject-matter of the contract, and the connection in which it is used. The signification to be affixed to it is that which will carry into effect the intention of the parties, and

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give to their contract the meaning and force which they intended it to have. *Thornton v. Boyd*, 25 Miss. 598; *Paris v. Hiram*, 12 Mass. 262. In the case in hand, it is very clear that the parties meant the year which had passed, and not a year, nor any part of a year, then in the future.

The point made, that attorney's fees were allowed without evidence as to their value, is not entitled to consideration, because the motion for a new trial does not present any question as to the amount of the recovery.

The remaining question is whether the appellants were entitled to an order directing that a levy be made upon, and a sale made of, the partnership property in the hands of the receiver before seizing the property of the appellants. The court did decree that the receiver pay into court, for the use of appellee, the full amount of the judgment rendered against the appellants. This was as favorable an order as the appellants had any right to ask; we, indeed, are inclined to think one to which they were not at all entitled. The order could have been made effective; for, in case the receiver wrongfully refused to obey it, the court, whose officer he was, could have enforced prompt and complete obedience. Ample means of enforcing the order were within reach of the parties.

It would have been error to order a seizure and sale of the property in the hands of the receiver, for it was then in the custody of the court, and was not held for the benefit of any particular creditor, but for the benefit of all. No one creditor had a right to have it seized and forced to sale upon execution for his own benefit. Our statute, providing for the levy and sale of a principal's property before resorting to that of the surety, has no application at all to a case where the principal's property is in the control and custody of the court.

Judgment affirmed.

 Williams v. Perrin et al.

No. 7885.

WILLIAMS v. PERRIN ET AL.

73	57
128	456

DECEDENTS' ESTATES.—Vacating Sale.—Increased Offer.—The provision of the statute, that, in sales of real estate made by administrators and guardians, the court may vacate the sale when it appears that a sum exceeding that bid by ten per cent., exclusive of the expense of the sale, can be obtained, applies, by implication, to sales of personalty made under order of the court, and the court may, in the exercise of a sound discretion, refuse to confirm a private sale of personalty when it is shown that such an advance can be obtained.

SAME.—Confirmation.—Vested Right.—Where, by the terms of the order authorizing such a sale, the sale is to be reported to the court for confirmation, until such confirmation is had the contract of purchase does not confer a vested right on the purchaser.

SAME.—Circuit Courts.—Jurisdiction.—Since the abolition of common pleas courts, the circuit courts have original and exclusive jurisdiction of all matters relating to the settlement and distribution of decedents' estates.

From the Tippecanoe Circuit Court.

R. Jones and D. Royse, for appellant.

R. C. Gregory, W. B. Gregory, W. C. Wilson, J. H. Adams, R. P. Davidson and J. C. Davidson, for appellees.

WOODS, J.—We take from the brief of counsel for the appellant, the following statement of the case :

“July 9th, 1878, the appellees, Perrin and Weibers, filed their petition, asking an order for the sale by them, at private sale, of certain realty described, and, also, the Lafayette Journal newspaper property, consisting of engine, presses, type, paper, etc., and the good-will.

“An order was entered for sale, at public or private sale, of all said realty and personalty in such parcels or parts as the administrators may deem advisable, all sales to ‘be reported to the court for confirmation.’ An inventory of this personalty was filed August 9th, 1878, the appraisement being \$3,275.50, of which \$1,000 was the appraised value of the good-will of the business.

“September 9th, 1878, the administrators filed a report of

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the sale of the Journal property, and good-will, to the appellant, for the sum of \$7,500, 'to be paid on confirmation of said sale by the court, possession of the property to be given on or before February 5th, 1879,' and asked the confirmation of the sale. On the same day Abner H. Longley filed his petition, stating some matters that would tend to show that the administrators had not properly exercised their discretion at the time of the sale, and offered to take the property at \$9,000, \$4,000 cash and the residue in one and two years, with six per cent. interest, and asked the court to refuse a confirmation of the sale. On the 11th of September, 1878, Septimus Vater filed a similar petition, offering to pay for the property, \$8,250 cash. September 20th, 1878, the appellant filed a petition stating his readiness to pay his bid, and asking a confirmation of the sale, denying, also, some matters stated in the petitions of Longley and Vater. October 1st, 1878, the court, after hearing the evidence offered, ordered that, if said Vater would give bond to the satisfaction of the court to bid \$8,250, then the sale to the appellant would not be confirmed. This bond is executed and approved, and the court 'annuls and sets aside' the sale to the appellant, and orders a resale. Exception by appellant to so much of the order as refuses to confirm the sale to him, and sets the same aside. October 16th, 1878, the administrators filed a report of a sale of said property, on the 12th of the month, to said Vater for \$9,450. The report confirmed and order to transfer the property, and, also, all right of the appellees under lease to Vater by them, of the property and the building in which it then was. Exception to this order by appellant.

"The evidence is in the record, but the conclusion of the court, as to what the evidence proved, makes it unnecessary to state the oral testimony. The witnesses agree that the only offers made for the property were by Williams, Vater and Longley; that, on the day the sale was closed, each of

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them was present, and each raised his offer, and kept raising it until the last offer by Williams, and the sale was made to him only after each of the others had declined increasing the offer; that Williams' offer of all cash was larger than any offer on time by the others.

“The court ‘found that the sale of said property to said Williams was, in all respects, a fair and proper one, and there was no cause to set aside said sale and order a resale, except, only, that a better offer has, since said sale, been made by said Vater and by said Longley, and such better offer made it proper that the court, in the exercise of its discretion, should set aside such sale and order a resale.’ ”

The court committed no error in refusing to confirm the sale reported, and in ordering a resale. By the terms of the order authorizing it, the sale was to be reported to the court for confirmation; and, until such confirmation was had, the contract of purchase could not operate to confer on the appellant a vested right.

Section 60 of the act concerning “Decedents’ Estates,” 2 R. S. 1876, p. 512, provides that, “Whenever the court of common pleas shall be satisfied that it would be for the advantage of such estate to sell any part of the personal property thereof at private sale, such court may authorize the executor or administrator to thus sell the same; but such property shall in no case be sold for less than its appraised value; nor shall such executor or administrator become the purchaser thereof; and a return of such sale shall be made within the time prescribed by the court, not to extend beyond three months.”

The court of common pleas had “original and exclusive jurisdiction of all matters relating to the settlement and distribution of decedents’ estates,” and since the court of common pleas was abolished, the circuit courts have been clothed with the same jurisdiction. In reference to sales of

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real estate by administrators and guardians, it is expressly enacted that the sales shall be reported to the court for confirmation, and, if the court be satisfied that the sale had been unfair, or that a sum exceeding the sum bid or agreed on at least ten per cent., exclusive of the expense of the sale, can be obtained, the court may vacate the sale. While there is no such express provision with reference to sales of personalty, made under the order of the court, there can be no doubt that, under its general jurisdiction over the settlement of estates of decedents, the court has the power to, and in the exercise of a sound discretion may, refuse to confirm a private sale of personalty, if it appear that a substantial advance can be had upon the price reported. Whether a sale should be set aside in order to obtain an advance of less than ten per centum, if there was no other cause for refusing to confirm, we need not decide. In the appellant's case, a ten per cent. advance was offered and secured, and a much larger advance obtained.

Judgment affirmed, with costs.

No. 7593.

LAWTON v. CASE ET AL.

MECHANIC'S LIEN.—*Material-Man.*—*Pleading.*--*Ownership of Real Estate.*--In an action to enforce a mechanic's lien for materials used in the construction of a building, furnished by a material-man to a contractor, and not to the owner, the complaint must aver that the defendant was the owner of, or asserting some interest in, the real estate against which the lien is sought to be enforced, and must show that such materials were furnished specially for such building.

73	60
144	104

73	60
167	42

73	60
171	519

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SAME.—*Notice, Time of Filing.—Complaint.*—A complaint by a material-man, to enforce such lien, must show that the notice thereof was filed within sixty days from the time the materials were furnished. The allegation, that such notice was filed within sixty days after the completion of the building, is insufficient.

SAME.—*Practice.—Personal Liability.—Defects in Lien, how Reached.—Motion to Strike Out.—Demurrer.*—Where there is a personal liability shown against the defendant, the lien being auxiliary to such liability, the validity of the lien may be tested by a motion to strike out so much of the complaint as refers thereto; but, where there is no personal liability shown, the right of action depending solely upon the validity of the lien, the sufficiency of the complaint may be tested by a demurrer thereto.

SAME.—*Personal Judgment.*—No personal judgment can be taken upon the foreclosure of a mechanic's lien, where the owner is sued by a sub-contractor, unless he has properly served upon such owner the notice required in section 649, 2 R. S. 1876, p. 267.

SAME.—*Allegations of Complaint.—Sub-Contractor.*—A complaint by a sub-contractor to enforce a mechanic's lien, and seeking a personal judgment against the owner of the building, for a debt created by the contractor, must show ownership, the service of the notice provided for in section 649, *supra*, and that, when served, the owner was indebted to the contractor.

From the Grant Circuit Court.

J. L. Custer, for appellant.

R. W. Bailey and *A. Diltz*, for appellees.

ELLIOTT, J.—The appellees instituted this action to foreclose a mechanic's lien, and succeeded in obtaining judgment.

The complaint is in two paragraphs, to each of which demurrers were overruled.

The first paragraph was clearly bad, because it does not allege that the appellant was the owner or claimant of the real estate upon which the appellees seek to enforce a lien. The materials, for which the lien was filed, were furnished to a contractor, and not to the appellant. The only inference that can reasonably be drawn from the allegations of the pleading is, that Hill, the contractor, and not the appellant,

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was the owner of the real estate. The appellees could secure a cause of action against the appellant only by showing that he was the owner of, or claimant asserting some interest in, the real estate, for they could have had no claim upon him except on the ground that he owned, or claimed to be the owner of, the property for which the materials were furnished. There are other defects in this paragraph, but we deem it unnecessary to now consider them.

The second paragraph alleges that the appellant contracted with one Hill for the erection of a house on real estate owned by the former; that, during the year 1877, appellees furnished the contractor with materials to be used in said house; that they were so used, and that the appellees, within sixty days from the completion of the house, filed notice of their intention to hold a lien. We have given only an outline of the paragraph, but one sufficiently full to exhibit the force of the objections urged against it.

The first point made by the appellant is, that this paragraph of the complaint does not show that the materials were furnished upon the credit of appellant's property. The law unquestionably is, that the complaint must show that the materials were furnished for the building. *Hill v. Sloan*, 59 Ind. 181; *City of Crawfordsville v. Lockhart*, 58 Ind. 477. The complaint is not very direct or specific on this point, but we think enough is shown to make it good against this objection.

The second objection which appellant urges against this paragraph is, that it does not show that the notice was filed within sixty days after the materials were furnished. The allegation in the body of the pleading, and the recital in the notice of lien, which is set out as an exhibit, show that the notice was filed within sixty days after the completion of the building, but it does not appear that it was filed within sixty days from the time the appellees furnished the mate-

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rials. It was held in *Hamilton v. Naylor*, 72 Ind. 171, that the complaint must show that the notice was filed within sixty days from the time the materials were furnished. That case received a second and careful consideration upon full argument, on petition for a rehearing, and must be regarded as decisively settling the law upon this point. Upon the authority of that case, the paragraph under examination must be held bad. Woods, J., dissents.

Some confusion seems to have arisen upon a question of practice. It is said that a demurrer will not lie, but that the remedy is by motion to strike out so much of the complaint as refers to the lien. There are two distinct classes of cases, and the confusion has arisen from confounding them. Where there is a personal liability shown, and the lien is auxiliary or collateral to such liability, then the remedy is by motion, and not by demurrer. The second class is where there is no personal liability, and the entire right of action depends upon the validity of the lien. The case in hand is a type of the latter class. Here there is no personal liability, and there can be no right of action unless there is shown to be an existing valid lien. In such a case, demurrer is the appropriate mode of presenting the question of the sufficiency of the complaint.

The appellant insists that the court did wrong in rendering a personal judgment against him, and that the relief of the appellees should be confined to the specific property covered by the lien. It is plainly the law, that no personal judgment can be taken upon a mechanic's lien, where the owner is sued by a sub-contractor, unless the notice provided for in section 649 of the statute is properly served upon the owner. Phillips on Mechanics' Liens, secs. 447, 449; *Crawford v. Crockett*, 55 Ind. 220.

There is an attempt, in the first paragraph of the complaint, to state a cause of action warranting a personal judgment, but the paragraph fails utterly to do so. We have

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already noted the fact that the paragraph is bad, because it does not allege that the appellant was the owner of the real estate upon which the house was erected, and to this defect we may now add (as we are considering the pleading from a different point of view) two other very material ones. The two defects to which we refer are the insufficiency of the notice served upon the appellant, and the failure to aver that there was any indebtedness from him to his contractor, Hill. A complaint which seeks to hold an owner for a debt created by the contractor must show ownership, the service of a sufficient written notice, and that, when the notice was served, the owner was indebted to the contractor.

Where the complaint only seeks to subject the property to the lien, and asks no personal judgment, then, of course, it need not aver the existence of an indebtedness from the owner to the contractor, nor the service of notice as provided in section 649. The first paragraph of the complaint under mention is so framed as to attempt to create a personal liability, and establish a right to a foreclosure of the lien against the property. It is bad as a complaint for personal judgment, as well as for the foreclosure of a material-man's lien. The pleader, instead of showing a cause of action for both a personal judgment and a foreclosure, has failed to show a right to either.

Judgment reversed, at costs of the appellees.

No. 7868.

FESSLER, ADM'R, v. CROUSE.

DECEDENTS' ESTATES.—*Pleading.*—*Cross Complaint.*—*Practice.*—*Administrator De Son Tort.*—*Contract.*—*Promissory Note.*—*Judgment.*—In an action by A., as the administrator of B., against C., as administrator

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de son tort, C. filed a cross complaint, alleging a contract with B., in his lifetime, whereby B. had transferred all his property to C., and that a part of such property consisted of notes against A., which had been wrongfully taken, and were wrongfully withheld by A.

Held. that, although such cross complaint named A. as an individual, and not as administrator, yet, it being apparent that he held such notes as administrator, such cross complaint was sufficient, if proven true, to entitle C. to a judgment and an order for the return of said notes.

Held. also, that, in such action, a personal judgment could not be properly rendered against A. on such notes.

SAME.—Instruction.—In such action it was erroneous to instruct the jury that, if they found something due the plaintiff on his complaint, and something due the defendant on his cross complaint, they should deduct one sum from the other, and give a verdict for the excess to the party entitled thereto.

From the Madison Circuit Court.

C. D. Thompson, for appellant.

R. Lake, for appellee.

WOODS, J.—The appellant, as administrator of the estate of William Crouse, sued the appellee, as administrator *de son tort* of said estate, charging that the appellee wrongfully intermeddled, and, taking possession, converted a large part of the estate, consisting of money, promissory notes and other personal property, to his own use, to the damage of said estate in the sum of ten thousand dollars.

This complaint the appellee denied, and filed a cross complaint, wherein it is averred, in substance, that the deceased, in his lifetime, made a contract with the appellee, whereby the appellee undertook to “nurse, board, wash and properly care for him as long as the said William Crouse should live, and, after his decease, defray the expense of his funeral, and pay all just debts;” and, in consideration therefor, the appellee “was to have and receive all the estate the said William Crouse, deceased, owned or possessed,” and that the deceased, in his lifetime, accordingly transferred, assigned and delivered to the appellee “all his property, moneys, choses in action, and all that he was possessed of, or should die

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seized of ;” that the appellee fully performed said contract on his part ; that said decedent was the owner of, and held, sundry promissory notes, among which were four against the appellant, amounting to \$675, and of which copies could not be given, because the same were in the possession of the appellant, all of which were due and unpaid ; that said notes were wrongfully obtained and wrongfully detained from the appellee, by said appellant. Wherefore, etc.

The appellant denied this cross complaint, and the issues so joined were tried by a jury, on whose verdict the court gave judgment against said David Fessler, and in favor of the appellee, for the sum of six hundred and seventy-five dollars.

The appellant has assigned for error :

1st. That the cross complaint does not state facts sufficient to constitute a cause of action ;

2d. The overruling of the motion of the appellant for a new trial ;

3d. The overruling of the appellant’s motion in arrest of judgment.

Under the first and third assignments, the appellant contends that the matters alleged in the cross complaint are not so connected with the cause of action set forth in the complaint as to constitute a cause for cross complaint ; that the plaintiff sues for a tort against the estate of the deceased, in which the plaintiff had no interest except as a trustee, while the cross complaint seeks to recover from the plaintiff certain notes, which it is claimed he holds in his individual capacity, and not as administrator ; that there is no such mutuality as could make the cross complaint sufficient, and, therefore, it does not state facts sufficient.

It is true that the cross complaint names the appellant only as an individual, and not in his trust capacity, but still it is apparent that, if the appellant had possession of the notes referred to in the cross complaint, he had them in his

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character as administrator, and we may fairly hold that the cross complaint charges him in that capacity ; and, if proven true on the trial, it entitled the appellee to a judgment and order for the return of said notes to his possession. The demurrer was, therefore, properly overruled.

It is claimed that the first instruction of the court to the jury was wrong because it did not direct the jury to add ten per cent. penalty as a part of the damages to be awarded to the plaintiff. The instruction was right so far as it went, and, if he desired it, the appellant should have moved for an instruction in reference to the penalty. Besides, it is evident that the omission did the appellant no harm. The verdict of the jury was entirely against him, and nothing was found in his favor to which the penalty could have been added.

The second instruction is said to be erroneous, in that it "states to the jury that the defendant has averred, in his cross complaint, that the plaintiff wrongfully obtained the notes," etc. It is sufficient to say that counsel has mistaken the fact. The pleading does contain the averment. This also disposes of the objection made to the third instruction.

It is objected to the fourth instruction that, thereby, the court attempted to create a set-off when none was pleaded, and that the instruction was wholly contrary to the evidence. The court erred in giving this instruction. It is to the effect that, if the jury found something due the plaintiff on his complaint, and something due the defendant on his cross complaint, they should deduct one sum from the other, and give their verdict for the excess to the party entitled thereto. This was evidently upon the theory, which we deem erroneous, that the appellee had a right, on his cross complaint, if true, to a money judgment against the appellant ; and, in fact, as already stated, the verdict and judgment were so rendered. The plaintiff sued as administrator, and the action was for the alleged unlawful intermeddling of the defendant with the

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estate, and the conversion of the notes and other property thereof to his own use. Now, while we think it was competent for the defendant to show, by way of counter-claim, the facts set up in his cross complaint, and ask a judgment thereon for the return of said notes to his possession, it was not competent for him, in this action, to claim a personal judgment against the appellant, either for the amount or value of the notes referred to. The appellant held the notes as administrator, and in the suit as brought no claim against him, personally, could constitute a proper counter-claim, and no personal judgment thereon could be properly rendered against him.

Judgment reversed, with costs and with instructions to grant a new trial.

73	68
128	489

73	68
130	75

73	68
131	7

73	66
150	440

73	68
155	64

 No. 6955.

BAKER ET AL. v. NEFF.

CORPORATION.—Defective Organization.—Right to Enjoy Corporate Franchises.—Contract.—Estoppel.—Where one contracts with an association, as a corporation, he is estopped from afterwards denying its legal existence as such. And where there has been an attempt to create a corporation, and the statute has been in part complied with, and there has been an assertion and exercise of corporate powers, the right of such organization to possess and enjoy corporate franchises, and to hold real estate, can not be litigated in an action instituted by an individual citizen, but only in a direct proceeding therefor, brought in the name of the State.

From the Martin Circuit Court.

J. Baker, for appellants.

J. T. Rogers and *T. Brown*, for appellee.

ELLIOTT, J.—This appeal brings before us the question of

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the sufficiency of the complaint of the appellants, who were the plaintiffs below.

The material allegations of the complaint may be thus summarized: In August, 1857, William F. DeLamater, David B. Lupton and Samuel B. Munson attempted to organize a corporation, under the act of May 20th, 1852. Articles of association were signed and acknowledged before a notary public. The name, the object, the amount of capital stock, the location, the duration of the corporation, and the names of the directors are stated in the instrument. The articles of association were filed in the office of the recorder of Martin county, on the 20th day of August, 1857, and a duplicate was filed in the office of the secretary of state on the 3d day of July, 1858. The land in controversy was conveyed to the corporation by its corporate name of the American Paint Manufacturing Company, by the appellant Hannah M. DeLamater, and her husband William F. DeLamater, then in life, but since deceased. William F. DeLamater was the owner at the time of the conveyance to the American Paint Manufacturing Company, and, at his death, he devised all his property to his widow. After the death of said William F. DeLamater, the appellant Hannah M. DeLamater conveyed one-half of the real estate to her co-appellant, John Baker. In 1872, the land was sold upon a judgment against the said paint company, and through that sale appellee claims title.

The contention of appellants' counsel is, that there was no corporation until the duplicate of the articles of association was filed in the office of the secretary of state, and that there was, therefore, no grantee capable of taking at the time the deed was executed.

The appellants, having contracted with the appellee's remote grantor as a corporation, are estopped to assert that there was no such corporation. It is not claimed that the corporation was one which could not have been created under the

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law ; the claim is that the law was not complied with. If appellants were correct in their theory, that there was no corporation until the duplicate of the articles of association were filed in the office of the secretary of state, a point we need not, and do not, decide, they are not in a situation to successfully urge it, because they are conclusively estopped by the deed made to the association, wherein it is recognized as, and acknowledged to be, a corporation. This doctrine is very clearly and forcibly enunciated in the opinion of the court, prepared by WORDEN, J., in *Snyder v. Studebaker*, 19 Ind. 462.

The complaint shows that there was an attempt to create a corporation ; that the statute was in part, at least, complied with ; that there was an assertion and exercise of corporate powers ; and that, in the contract with appellants, there was an assumption of corporate franchises. In such a case, the right to corporate existence can not be tried in an action instituted by an individual citizen, in his own behalf, for the purpose of annulling a contract. The right to possess and enjoy corporate franchises can, in such a case, only be litigated in a direct proceeding, instituted in the name of the State.

The right of an association, assuming to be a corporation under a law authorizing the creation of corporations of the class to which it claims to belong, and which has exercised powers as a corporation, to hold property, can not be questioned in an action brought by an individual citizen to set aside a contract which he had made with the association in its corporate name and character. The right of a corporation to hold property can only be questioned by a direct proceeding, prosecuted in behalf of the State.

There would be manifest injustice in allowing appellants a recovery, for their claim is entirely destitute of equity. By their own act they enabled the association to appear as the owner of the property, and now, long after it has been seized

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and sold to pay the debts of the association which they recognized as a corporation, they assert a claim against one who acquired title at the sheriff's sale, made upon the judgment rendered against the corporation, and without tendering back the consideration received from the corporation.

Judgment affirmed.

No. 9135.

WINFIELD TOWNSHIP, EX REL. PATTON, SUPERVISOR, *v.* WISE.

73	71
134	67
78	71
157	112

HIGHWAYS.—*Exemption from Labor.—Township Trustee.—Exemption* from labor on highways, under section 9, 1 R. S. 1876, p. 557, is to be determined exclusively by the township trustee, and the ground merely, on which he might exempt a person from road work, is insufficient to constitute a defence to an action for failure to perform such work.

SAME.—*Road Labor.—Commutation.—Jury.—Exemption.—*The amount of exemption allowed in cases of judgments founded on contracts can not be considered by the jury in such action, in determining whether the defendant was too poor to pay the commutation for such labor.

APPEAL.—*Amount in Controversy.—Dismissal.—*Where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars, the appeal will be dismissed in the Supreme Court.

From the Lake Circuit Court.

M. Wood and *T. J. Wood*, for appellant.

T. S. Fancher, for appellee.

WORDEN, J.—This action was brought by the appellant against the appellee, before a justice of the peace, to recover for a failure to perform road work, or to pay the commutation therefor. The cause was appealed to the circuit court, where it was tried by a jury. Verdict and judgment for the defendant.

There was evidence on the trial tending to show that the defendant, from bodily infirmity, was unable to work upon

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the road, and, also, that his property was of less value than \$600 ; but there was no evidence that he had been exempted from such work by the township trustee.

The court gave the jury the following instruction :

“As to the question of how much property a man must have, or how little, in order to bring himself within the provision of the statute, ‘too poor to pay the commutation,’ [it] is a question of both law and fact ; and so I instruct you that if you find from the facts that the defendant was the head of a family, and a *bona fide* resident, then, in determining the question of whether he is too poor to pay the commutation, you may take into consideration the exemption allowed by law to such a person, which, as a matter of law, I instruct was six hundred dollars.”

This instruction seems to us to have been wrong, inasmuch as there is no exemption of property from execution in such cases. 1 R. S. 1876, p. 857, sec. 11. There being no exemption in such cases, it is difficult to see how the amount exempt in cases of judgments founded upon contract could be considered by the jury in determining whether the defendant was too poor to pay the commutation.

There was another radical error in the instruction. It assumes that the defendant might set up, as a defence to the action, that he was unable, from bodily infirmity, to work on the road, and too poor to pay the commutation therefor, and make an issue in the cause upon those questions.

This, it is quite clear from the statute, can not be done. The statute provides that, “On application to the township trustee, any person liable to work on highways may be exempt therefrom, if it be shown he is unable from bodily infirmity to work thereon, and that he is too poor to pay the commutation therefor ; also, any person belonging to any legally organized fire company, and in such cases the township trustee shall execute to such person a certificate

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thereof, which shall, on being presented to the supervisor, entitle him to such exemption." Sec. 9, statute above cited.

The whole matter of exemption, in such cases as the present, is left to the township trustee. If he exempts a person, and gives him a certificate, as provided for, that is a good defence. But, if the trustee fails or declines to exonerate a person on the ground that he is unable to work, and too poor to pay, there is an end of the question. It was clearly intended by the Legislature, that exemptions of this character should be determined exclusively by the trustee, and not that the ground merely on which he might exempt should constitute a ground of defence to such action.

But, as the amount in controversy in this case, exclusive of interest and costs, does not exceed fifty dollars, the appeal will have to be dismissed. Acts 1879, p. 168.

The appellant suggests that the case may come to this court under section 347 of the code, notwithstanding the act of 1879. But section 348 shows that, when a cause reserved under section 347 comes to this court, it comes *by appeal*, as fully as in any other case.

The appeal is dismissed, at the costs of the appellant.

No. 7917.

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73 73
137 505

PRACTICE.—*Assignment of Errors.*—An assignment of error, that "the court erred in overruling appellants' several demurrers to the complaint," is sufficient.

SAME.—An assignment of error, that the complaint does not state facts sufficient to constitute a cause of action, brings in question the sufficiency of the complaint in all respects not cured by the verdict.

SURETY.—*Contribution.*—*Decedents' Estates.*—*Claim.*—*Final Settlement.*—An action for contribution can not be maintained against the heirs of a

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decendent, who had been surety on the bond of a guardian, by a subsequent surety thereon, for money which the latter paid on default of the guardian, until the estate of the decendent has been finally settled. Until such final settlement the proper course was to file such claim against the estate.

From the Washington Circuit Court.

S. B. Voyles, D. M. Alspaugh and J. C. Lawler, for appellants.

H. Heffren, J. A. Zaring and A. B. Collins, for appellees.

WOODS, J.—The appellees, Tucker and Manley, sued the appellants upon a complaint showing the following facts:

The defendants are the children, grandchildren and heirs at law of Thomas W. Allen, deceased, and, as such heirs, have each received from said estate property and money, of a specified value and amount. In 1865 Joseph Allen died, leaving a widow, Sarah J., and three minor children (the defendant grandchildren herein), of whom Sarah J., in 1866, was appointed guardian, and gave bond in \$8,000 for the faithful discharge of her duties, with said Thomas W. Allen, who was then in life, as her surety thereon. Thereafter she was required by the court to give an additional bond, and, on December 13th, 1866, she did accordingly execute an additional bond, conditioned as the first, in the sum of \$12,000, with the appellees as her sureties therein. Each of said bonds was joint and several in its terms. Said Sarah continued in said trust until October, 1874, when she was removed by an order of the court, and, in June, 1875, Warden W. Stevens was duly appointed and qualified as her successor, and, as such, in the name of the State, brought suit against her and the appellees to recover the sum of \$3,000, which she had in her hands as such guardian, and had failed and refused to pay over, and, judgment having been rendered against them in said suit for said sum, the appellees were compelled to pay, and did pay, the amount of said

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judgment in satisfaction thereof, said Sarah being and remaining wholly insolvent. Long before the removal of said Sarah from her said trust as guardian, said Thomas W. Allen had died, and Alva C. Trueblood had been appointed administrator of his estate.

The prayer of the complaint is, that the court give a judgment compelling the defendants, as heirs at law of said Thomas W. Allen, who was surety on said Sarah's first bond as such guardian, to pay to the plaintiffs said Thomas W.'s contributive share of said sum of \$3,000, and for other proper relief.

Two of the defendants each filed a several demurrer, and eight of the defendants filed a joint demurrer, to the complaint, for the want of sufficient facts, which demurrers were overruled. One of the defendants did not demur, either separately or jointly.

The first assignment of error is in these words: "The court erred in overruling appellants' several demurrers to the complaint."

The appellees contend that this assignment is "bad for the reason that several errors can not be assigned in a lump or jointly." We do not think the point well made. No precedent is cited, and we are not disposed to make one now. The assignment fairly brings to our attention the ruling of the court on the several demurrers referred to, and the ground on which we are asked to refuse to consider whether the rulings were right or wrong, is too narrow and technical for the practical administration of justice. Besides, there is another assignment that the complaint does not state facts sufficient to constitute a cause of action, and this brings in question the sufficiency of the complaint in all respects not cured by the verdict.

The first objection made to the complaint is, that it does not show that the estate of Thomas W. Allen had been finally settled. This is a fatal defect. Until there has been

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an administration fully accomplished and the administrator discharged, a suit against the heirs on the theory of this complaint can not be maintained. 2 R. S. 1876, p. 554, sec. 178; *Rinard v. West*, 48 Ind. 159. Until such final settlement of the administration has been had, the plain and only proper course is to file the claim under sec. 62 of the act for the settlement of decedents' estates; and, if letters have not been issued, the issuing thereof should be procured under the provisions made therefor. We must therefore hold the complaint bad for want of proper averments in this respect, and this makes it unnecessary to decide whether in other respects the complaint shows a good cause of action.

Judgment reversed, with costs and with instructions to sustain the demurrers to the complaint.

No. 7434.

CARRIGER v. SICKS ET AL.

PLEADING.—Practice.—Reply.—Waiver.--Going to trial without a reply is a waiver thereof; and, upon the trial, the matter of the answer is deemed controverted, as upon a denial.

PROMISSORY NOTE.--Counter-Claim.—Arrest of Judgment.—A motion in arrest of judgment, by the endorser of a promissory note, in a suit by the holder against the maker and endorser, will not raise any question arising upon a counter-claim, filed by the maker against such endorser.

From the Boone Circuit Court

C. S. Wesner, for appellant.

R. W. Harrison, B. S. Higgins and *J. W. Clements*, for appellees.

WORDEN, J.—This was an action by Thomas O. Sicks as the holder, against Isaac T. Davis as the maker, and

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John J. Carriger and Henry C. Brush as endorsers, of a promissory note governed by the law merchant. Issue, trial, finding and judgment for the plaintiff.

Other parties were made defendants, and other proceedings were had, not necessary to be noticed in this opinion.

The only question in the case is presented by the ruling below in overruling a motion, by Carriger, in arrest of judgment. The complaint stated all the facts necessary to make Carriger liable as the endorser of the note. Davis pleaded payment of the note, and the cause was tried without any reply to the answer of payment.

It has been held, however, in numerous instances in this court, that, going to trial without a replication, was a waiver of the replication, and that, upon the trial, the matter of the answer would be deemed controverted, as upon a denial.

The motion of Carriger in arrest did not reach any question arising upon a counter-claim filed by Davis against him, or, if it did, it was too broad, and covered the case of Sicks against him, and, being an entirety, was properly overruled.

The judgment below is affirmed, with costs.

No. 7903.

SOHN v. THE MARION AND LIBERTY GRAVEL ROAD CO. ET AL.

PRACTICE.—*Bill of Exceptions.—When Must be Filed.—Extension of Time.—*

When a new trial is claimed on the ground that the verdict or finding is not sustained by the evidence, or is contrary to law, the court, at the time of overruling the motion, may give time to prepare bills of exception showing the evidence, but exceptions generally must be taken at the time the decision is made, and must be reduced to writing within the term at which the decision is made, unless the time is extended beyond the term by an order of the court made during the term.

73	77
137	168
73	77
147	500
73	77
148	183

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SAME.—*Conflicting Evidence.*—Where the evidence is conflicting, the Supreme Court will not review the decision of the trial court.

PLEADING.—*Complaint.*—*Relief.*—The relief to which a plaintiff is entitled must be limited to the case made by his complaint.

From the Grant Circuit Court.

— *Kersey, H. Brownlee and J. Brownlee*, for appellant.
A. Steele and R. T. St. John, for appellees.

WOODS, J.—The appellant complained of the appellees, alleging in his complaint, in substance, that the defendant Fankboner, as sheriff of the county, by virtue of an execution, issued on a judgment in favor of John B. McArthur, against Zachariah M. Harris and John S. Harris, which judgment had been assigned to the plaintiff, had levied on, and on the 11th day of April, 1878, had sold to the plaintiff, one hundred and sixteen shares of the stock of said gravel road company, taken as the property of Zachariah Harris, at and for the price of one hundred fifty and one-half dollars; that the plaintiff paid to the sheriff the costs, and offered to credit said sum of \$150.50, the amount of his bid, on said judgment and execution, and then and there demanded a transfer of said shares of stock in said company from the name of said Zachariah M. Harris to his, plaintiff's, name; that the books of said company are in its own hands, and it refuses to allow the sheriff to make a transfer of said stock, and said Fankboner refuses to transfer said stock on the books of the company, though requested to make the same, and though the plaintiff's execution constituted a proper and legal lien on said shares. And the plaintiff asks an order that said books of the company, now held at the residence of John Ratliff, in the township of Franklin, Grant county, Indiana, by said company, be delivered to said sheriff for the purpose of transferring to the plaintiff said shares of stock, as required by section 437 of the law on that subject, and for such other order or orders as may be just and equitable.

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A demurrer to this complaint for want of facts was overruled and exception. Answer in four paragraphs, of which the first was a general denial. Demurrer to second, third and fourth paragraphs sustained; no exception taken, and cause continued. At the next term a second demurrer to the answer was filed, overruled as to the second paragraph, sustained to the third and fourth, and exception taken by the parties respectively. Trial was then had by the court, exceptions taken as to the introduction of evidence, but no bill of exceptions filed, and no time asked or given for that purpose. Having heard the evidence, the court took time to consider, and at the next term entered a finding and judgment for the defendants, overruling the plaintiff's motion for a new trial, and then granting time to file bills of exception, and a bill was filed within the time so allowed, showing the evidence and also the exceptions taken on the trial to the introduction of evidence.

This bill of exceptions is a proper bill, in so far as it shows the evidence in the case. Whenever a new trial is claimed on the ground that the verdict or finding is not sustained by the evidence, or is contrary to law, the court may properly, at the time of overruling the motion, give time to prepare bills of exception, showing what the evidence was, as the evidence is pertinent to ruling then made; but section 343 of the code provides, in reference to exceptions generally, that "The party objecting to the decision must except at the time the decision is made; but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court." The term here meant is that at which the decision was made and the exception taken, and the order extending the time beyond the term must be made during that term; otherwise the exception will be deemed waived or lost. The fact that the motion for a new trial may not be passed on until a subsequent term, does not affect the rule. It is not

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the policy of the law, that the right to file bills of exception shall remain open indefinitely, but that the facts on which disputed rulings of the courts have been made shall be stated, together with the exception and grounds therefor, while fresh in memory. *Nye v. Lewis*, 65 Ind. 326; *Kendel v. Judah*, 63 Ind. 291.

The only question, therefore, which is preserved in this record as made up, is whether the finding is sustained by sufficient evidence. There is evidence which tends to support it. Counsel claim that the preponderance is the other way, but where there is conflicting evidence this court does not attempt to review the decision of the trial court.

The point is made and pressed that the plaintiff ought to have had a finding and judgment for \$150, the dividend declared on the stock in question; but, unless entitled to the stock itself, it is difficult to see how the appellant could be entitled to the dividends thereon. Besides, the suit was not brought to recover dividends. There is no averment in the complaint, showing that any had been declared, and, if there had been, they could afford no cause for a joint action against the gravel road company and the sheriff, Fankboner.

The conclusion we have reached makes any consideration of the cross errors assigned unnecessary.

Judgment affirmed, with costs.



73	80
139	522

No. 7555.

LOVE ET AL. v. PAYNE.

PARTNERSHIP.—*Partner's Interest.*—A third person can not, by buying the interest of one partner, become a member of the firm, unless all the partners consent.

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SAME.—The admission of a partner into a firm is not within the line of the partnership business.

SAME.—*Power of Member to Bind Firm.—Contract.—Sale of Partner's Interest.—Ratification.—Instruction.*—B., a member of a partnership and its business manager, contracted with A., that, if he would buy a retiring partner's interest, and pay the balance due upon such partner's share of the capital stock, he should receive a certain interest in the partnership property, free from all liens. Afterward, all the partnership property was sold upon a prior mortgage. Suit by A. against the firm for breach of the contract.

Held, that B. had no authority to make such contract.

Held, also, that, unless the partners had knowledge thereof, they were not bound.

Held, also, that the mere coming of A. into the firm, and the payment of money into the capital stock, are not, of themselves, sufficient to charge the firm with knowledge of such contract.

Held, also, that it was error to instruct the jury that the firm would be bound by accepting the benefits of the contract.

Held, also, that, by receiving A., and taking his money, into the firm, they did not ratify that stipulation of the contract, of which they were ignorant, guaranteeing a perfect title, it not being incident to, or implied in, the admission of A. as a member of the firm.

SAME.—*Agency.—Ratification.*—Ratification, where there is no express notice, can not extend beyond an adoption of the acts of the agent to the extent fairly and reasonably implied from the nature of the transaction.

From the Clay Circuit Court.

G. A. Knight, C. H. Knight and I. M. Compton, for appellants.

W. W. Carter and S. D. Coffey, for appellee.

ELLIOTT, J.—The Limited Liability Coal Company was the firm name of a partnership, of which all the appellants were members, and this action was instituted by the appellee against the appellants as members of said partnership. The complaint alleges that the said company entered into a contract with appellee, wherein it was agreed that in consideration of appellee's purchase of the interest of one William Blair, and payment of a certain sum into the partnership, he should be admitted as a partner, and that he should

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receive a one-fourteenth interest in said partnership property, free from all liens. The breach assigned is that he did not receive such interest, but that the firm suffered all the partnership property to be sold upon a prior mortgage, and that he really received nothing at all of value.

The only assignment of error discussed is that based upon the ruling denying a new trial. The appellants insist that they are entitled to a new trial because of erroneous instructions given the jury.

A very brief synopsis of the evidence will be sufficient to exhibit the questions presented upon the instructions. The appellants were all members of the partnership. John Elliott was the president and general business manager of the company. The company was engaged in the business of mining and selling coal. William Blair was a member of the firm, and appellee bought his interest. The appellee did contract with John Elliott, that if he, appellee, would buy Blair's interest and pay into the partnership \$285.00, he should receive one-fourteenth interest in the partnership property, free from all liens, and this agreement was made by Elliott while assuming to represent the firm. There was a breach of the contract. We have stated the general effect of the evidence in the form most favorable to the appellee, in order that the legal questions presented by the instructions may be plainly exhibited.

The second instruction asked by the appellee and given by the court is as follows: "If you should find from the evidence, that one John Elliott was a member of the Limited Liability Coal Company, and was acting as president of said company, and while so being a member thereof, and acting as such president, he made a contract with the plaintiff on behalf of said company, whereby the plaintiff became a member of said firm, and in consideration thereof it was agreed that the plaintiff should pay into said firm a given amount of money, and that said company received the plain-

Love et al. v. Payne.

tiff as a member of said company, and accepted the benefits of said contract, they can not hold the benefits and at the same time deny the authority of said Elliott to make the same.”

This instruction does not assert, as appellants affirm, that Elliott had a right to bind the partnership because of the authority derived from his relationship to his co-partners. If it did, it would be clearly enough obnoxious to the objections pressed against it. The proposition is, not that Elliott had, as partner, a right to make the contract, but that, because the firm received and appropriated the benefits resulting from the act of one assuming to represent the partnership, the partners are liable. The admission of a partner into a firm is not within the line of partnership business, and Elliott would have no authority, as partner, to contract with appellee, that, if he would come into the firm, the partners would vest in him a title to one-fourteenth of the partnership property, freed from all liens. It is an elementary rule, that a third person can not, by buying the interest of one partner, become a member of the firm, unless all the partners consent.

Regarding the instruction as declaring that the partnership was bound by Elliott's acts, not because he was a member thereof, but because he preferred to act for the firm, and the fruits of his acts were received and enjoyed by the partnership, it must still be declared to be erroneous. It is erroneous because it leaves out of consideration the essential element of knowledge on the part of the members of the partnership. The mere coming of the appellee into the firm, and the payment of money into the capital stock, would not, of itself, charge the firm with knowledge of the agreement that he should receive one-fourteenth of the property, free from all incumbrance. The natural inference, in the absence of notice, would be the reverse; for the reasonable conclusion would be, that he stepped into the place of the

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partner whose share he bought, taking with it all its burdens and benefits. The instruction broadly asserts that the partnership would be bound by accepting the benefit of the contract, and no mention is made of notice or knowledge, on the part of the partners, of the contract of the president and agent, to vest in the incoming partner a title to one-fourteenth of the property, free from the liens then known to exist. The only benefit which the partnership got, or could have got, from the appellee, was the payment of the balance due upon Blair's share of the capital stock of the partnership. If Blair had remained a member, he could have been compelled to pay it, and Payne did no more than what his vendor, the retiring partner, was bound to do. Unless the partners had knowledge of the contract under which Payne came into the firm, they can not be deemed to be bound because the former paid his proportionate share of the common contribution to the capital stock. The benefits which the partnership retained were only those which Payne would have been bound to yield as a right to admission, and, without some knowledge of a contract, made by a professed agent, giving Payne a right to look to the partnership to convey to him a perfect title to a part of the partnership property, such a contract ought not to be held obligatory upon the partnership. The partners can not be bound, unless they retained the money after knowledge that a professed agent had, in their behalf, agreed to give the incoming partner an additional or distinct consideration from that arising from the sale to him of the retiring partner's interest, and his admission as a member of the firm.

The appellants, by accepting Payne as a co-partner, and by receiving into the common fund his money, did, undoubtedly, ratify to some extent the acts of Elliott, but not to the extent declared by the instruction. The ratification implied from such acts can not be so extended as to cover a distinct and independent contract made by the agent and of

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which the principals had no knowledge. If such a contract was one implied in the admission of Payne into the firm, or was an ordinary incident of such a transaction, then the doctrine of ratification might apply. But the contract upon which the appellees seek a recovery was not implied in, nor incident to, the purchase of Blair's interest and Payne's admission into the firm. By receiving Payne, and taking his money into the common fund, appellants did not ratify a contract of which they were utterly ignorant, and which was not incident to, nor implied in, the admission of Payne as a member of the partnership. The agreement of Elliott, guaranteeing, as in effect it did, that the appellee should receive a perfect title, was totally distinct from the purchase of Blair's interest, and Payne's admission as a partner in his stead, and could not be implied from Payne's coming into the partnership and paying his money into the common fund. Ratification, where there is no express notice, can not extend beyond an adoption of the acts of the agent, to the extent fairly and reasonably implied from the nature of the transaction; and, in this case, the nature of the transaction would have indicated nothing more than that Payne had taken Blair's place in the firm. To this extent only can it be said that retaining in the common fund the amount paid by Payne is a ratification of Elliott's acts.

Other questions are discussed, but, as the cause must be remanded for a new trial, we deem it unnecessary to consider them.

Judgment reversed, at costs of appellee.

NO. 6179.

ARMS ET AL. v. BEITMAN.

PRINCIPAL AND SURETY.—*Extension of Time.*—*Notice of Suretyship.*—*Release.*—In an action by the assignee, against the several makers, of a promissory note, proof by two of the makers thereof, that they were

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only sureties for their co-makers, and that such assignee, after the maturity of the note, in consideration of interest paid in advance, agreed with the principal, without their knowledge or consent, to extend the time of payment for a definite period, will not release such sureties, unless the assignee had notice of such relation between the makers when such agreement was made.

SAME.—New Trial.—Newly-Discovered Evidence.—Diligence.—To obtain a new trial on account of newly-discovered evidence, due diligence must be shown in endeavoring to obtain proof, on the first trial, of the facts sought to be established.

From the Daviess Circuit Court.

W. R. Gardiner, S. H. Taylor and J. T. Pierce, for appellants.

J. H. O'Neill and D. J. Hefron, for appellee.

NIBLACK, C. J.—Gabriel Beitman, as assignee of Louis Cosby, commenced this action before a justice of the peace against Thomas White, John Arms and Franklin White, as makers of a promissory note for one hundred and seventy dollars, dated March 13th, 1875, and payable to the said Louis Cosby eight months after date, and obtained judgment before the justice. Upon an appeal to the circuit court, there was again a finding and judgment in favor of the plaintiff. At the trial Thomas White testified that he was the principal obligor in the note, and that the other defendants were only sureties thereto; that on the 24th day of February, 1876, he paid to Beitman the sum of \$17.80 in full of interest to the 1st day of April then next ensuing, Beitman agreeing to wait for the principal; that neither one of his co-defendants knew anything of this payment of interest to, or agreement with, Beitman. Beitman, who was called as a witness by the defendants, testified that about the 1st day of March, 1876, the defendant Thomas White paid him \$17.80 as interest on the note until the 1st day of April, 1876, and that he agreed with the said White to wait for the principal until the last named day; that he did not know who was principal or who was surety; that he did not

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know that either Arms or Franklin White was only surety on the note. This was, in substance, all the material evidence introduced by the defendants.

After a finding was made for the plaintiff, the defendants Arms and Franklin White moved the court for a new trial :

First. Because the finding was contrary to law ;

Second. Because the finding was not sustained by sufficient evidence ;

Third. Because of newly-discovered evidence.

But their motion was not sustained.

In support of the third cause for a new trial Arms and Franklin White, the appellants here, filed their affidavit stating that they been taken by surprise by the testimony of Beitman ; that since the trial they had discovered important and material evidence in their behalf, that is to say, that Cosby, the payee of the note, did, at the time he transferred the note to Beitman, inform him, said Beitman, that they, the affiants, were only sureties thereto ; that they did not have an opportunity of seeing Cosby until after the trial, when, happening to speak with him on the subject, he communicated to them what he had informed Beitman as above ; that they had supposed that Beitman would swear that he knew that they were only sureties on the note, but that they did not know at the time of the trial in what way Beitman had been informed of such suretyship ; that they could prove by Cosby notice to Beitman of their suretyship, as above stated. The affidavit of Cosby, that he informed Beitman at the time of the transfer of the note that Arms and Franklin White were only sureties, accompanied the affidavit of Arms and Franklin White.

The failure of Arms and Franklin White to prove, upon the trial, that Beitman had notice that they were only sureties on the note, was fatal to their defence. The court did right, therefore, in finding against them upon the evidence

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adduced upon the trial. *Davenport v. King*, 63 Ind. 64; *McCloskey v. The I. M. & C. Union*, 67 Ind. 86.

The court also did right in refusing to grant a new trial for newly-discovered evidence. No diligence was shown to ascertain, before the trial, whether Beitman had notice of the suretyship of the appellants when he agreed to an extension of time for the payment of the note. It was not claimed that inquiry had been made of any one on the subject of such notice, previous to the trial, and nothing was alleged which could have afforded the appellants any good reason for believing that Beitman had notice of such suretyship. The mere calling of Beitman as a witness to establish certain supposed facts, without some previous inquiry as to the existence of such facts, can not be held to have been due diligence in endeavoring to obtain proof of the facts thus sought to be established.

The judgment is affirmed, with costs.

No. 9271.

MILLER v. THE STATE.

CRIMINAL LAW.—*False Pretences.*—*Indictment.*—Where an indictment for obtaining money under false pretences states facts which show that the money was obtained by such false representations as would deceive a man of common intelligence, it is sufficient.

From the Jennings Circuit Court.

J. L. Yater, for appellant.

D. P. Baldwin, Attorney General, *W. G. Holland*, Prosecuting Attorney, *W. W. Thornton* and *A. G. Smith*, for the State.

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Howk, J.—The appellant, Stephen S. Miller, was duly indicted, tried and found guilty, and, by the judgment below, sentenced to the State's prison for a term of years, upon a charge of having obtained money under false pretences. From the judgment of the circuit court the appellant, Miller, has appealed to this court, and has here assigned, as error, the decision of the court below in overruling his motion to quash the indictment. It will be seen, therefore, that the only questions presented by the record of this cause, and the error assigned thereon, for the decision of this court, relate to the sufficiency or insufficiency of the indictment on which the appellant was tried and convicted.

The indictment charged, in substance, that the appellant, "Stephen S. Miller, on the 12th day of October, A. D. 1879, at said county of Jennings and State aforesaid, did, then and there, feloniously, knowingly and designedly, and with the intent to defraud one James C. Hassey, falsely pretend and represent to him, the said James C. Hassey, that he, the said Stephen S. Miller, was then and there the owner of, and had on deposit to his credit in the Fourth National Bank of the city of Cincinnati, in the State of Ohio, a large sum of money, to wit, the sum of one thousand dollars, being then and there the money and property of him, the said Stephen S. Miller, as he then and there represented to the said James C. Hassey, and the said James C. Hassey then and there knew the said Stephen S. Miller, and had, before said 12th day of October, 1879, had business transactions with said Stephen S. Miller of an important character, and the said James C. Hassey had, before said 12th day of October, 1879, been introduced to the said Stephen S. Miller, as a man of means and large property, by one John J. Wright, whom the said James C. Hassey then and there well knew, and believed to be a responsible man, and a person on whom he, the said James C. Hassey, could rely, and whose word he, the said James C. Hassey, could and did

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rely upon, and that he, the said James C. Hassey, did then and there rely upon and believe the recommendations of the said John J. Wright, as to the solvency and business standing of the said Stephen S. Miller, and was induced thereby to give credit to the said Stephen S. Miller's statements and pretences as aforesaid, which said false pretences were then and there made by him, the said Stephen S. Miller, to him, the said James C. Hassey, feloniously and designedly, and the said Stephen S. Miller then and there knowing that the same were false, for the purpose of inducing the said James C. Hassey to loan the said Stephen S. Miller the sum of twenty dollars in money; and the said James C. Hassey, relying upon and believing the said false pretences to be true, and having no means of knowing, and did not know, that the same were false, and being deceived thereby was induced, by reason thereof, to loan, and did loan, him, the said Stephen S. Miller, a large sum of money, to wit, twenty dollars, in the lawful money of the United States, the same being a United States treasury note, of the denomination of twenty dollars, commonly called a greenback, then and there of the value of twenty dollars, and being then and there the money and property of the said James C. Hassey; whereas, in truth and in fact, the said Stephen S. Miller was not then and there the owner of one thousand dollars in money, and whereas in truth and in fact the said Stephen S. Miller did not then and there have on deposit, to his credit, in the said Fourth National Bank of the city of Cincinnati, in the State of Ohio, the said sum of one thousand dollars in money, or any other sum of money, but that said pretences were then and there false, as the said Stephen S. Miller then and there well knew, contrary to the form of the statute," etc.

It is apparent, we think, from the language of the indictment in this case, that it was intended therein and thereby to charge the appellant with the commission of the felony which is defined, and its punishment prescribed, in section

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27 of "An act defining felonies, and prescribing punishment therefor," approved June 10th, 1852. So far as applicable to the case at bar, the provisions of said section 27 are as follows :

"If any person, with intent to defraud another, shall designedly, by color of * * * any false pretence, * * * obtain from any person any money, * * * or thing of value ; such person shall, upon conviction thereof, be imprisoned in the State's prison not less than two nor more than seven years, and fined not exceeding double the value of the property so obtained." 2 R. S. 1876, p. 436.

This section of the felony act has often been the subject of examination and consideration in the decisions of this court ; and the insufficiency of the facts stated to constitute false pretences, within the meaning of the statute, has frequently been presented and relied upon, as cause for the quashing of the indictment, in other cases before this court. Upon this subject, in *Clifford v. The State*, 56 Ind. 245, in construing the above quoted section of the felony act of June 10th, 1852, it was said by this court : "It is true, that it is not every false pretence, on which a criminal charge may be predicated ; but such false representations of alleged existing facts, as might deceive the man of common intelligence, will support an indictment for obtaining goods under false pretences, and in such a case the party indicted ought not to be permitted to escape the punishment prescribed for the offence, upon the plea that a prudent or cautious man would not have been deceived by his false representations." *The State v. Magee*, 11 Ind. 154 ; *Leobold v. The State*, 33 Ind. 484 ; *Jones v. The State*, 50 Ind. 473 ; *The State v. Timmons*, 58 Ind. 98 ; *Bonnell v. The State*, 64 Ind. 498 ; *The State v. Snyder*, 66 Ind. 203 ; *Perkins v. The State*, 67 Ind. 270.

In the case at bar, we are of the opinion that the facts stated in the indictment were clearly sufficient to constitute

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a public offence, under the provisions of said section 27 of the felony act, and that the appellant's motion to quash the same was correctly overruled by the trial court. It is claimed in argument by the appellant's counsel, "that the facts stated in the indictment in this cause are not such as would induce a person of ordinary care and prudence to part with his property." In discussing this point, counsel says interrogatively: "Would any person of ordinary care and precaution have loaned the appellant, or any stranger or tramp, twenty dollars, or any other sum, merely because the stranger said he had one thousand dollars, or any other sum, in some bank out of the State?" Counsel thinks that this court will promptly answer his question in the negative; and so, perhaps, we might, if the record of this cause had presented his question in the precise terms in which counsel has expressed it. But there is nothing in the record to indicate that the appellant, at the date of the transaction on which the indictment is predicated, was a stranger to the prosecuting witness, James C. Hassey, or that he, the appellant, was what in modern times has been aptly termed a "tramp," a wandering, homeless vagabond. On the contrary, the indictment charged that, before that date, Hassey knew the appellant and had transacted business of an important character with him, and that he had been introduced to Hassey as "a man of means and large property."

The court did not err, we think, in overruling the appellant's motion to quash the indictment.

The judgment is affirmed, at the appellant's costs.

Spaulding *et al.* v. Blythe.

No. 7812.

SPAULDING ET AL. v. BLYTHE.

FRAUDULENT CONVEYANCE.—*Volunteer.*—A voluntary conveyance, made by a debtor who has no other property subject to execution, except that conveyed, is fraudulent as to creditors.

SAME.—*Pleading.—Complaint.—Notice.—Consideration.—Case Distinguished.*—In a complaint to set aside a fraudulent conveyance, made without consideration, it is not necessary to allege that the grantee had notice of the fraudulent purpose of the grantor. *Spaulding v. Myers*, 66 Ind. 264, distinguished.

SAME.—In such case, even though the conveyance was without consideration, the complaint must allege that, at the time, the grantor did not have sufficient other property, subject to execution, to satisfy the claims of creditors.

From the Clark Circuit Court.

J. H. Stotsenburg, for appellants.

ELLIOTT, J.—This appeal brings before us the question of the sufficiency of appellee's complaint.

The complaint seeks to set aside certain conveyances which are alleged to have been made to defraud creditors. Two conveyances are attacked as fraudulent. The first of these was executed on the 30th day of July, 1873, by John Spaulding and his wife, Ella Spaulding, to Henry S. Barnaby; the second was executed on the — day of —, 1874, by said Henry S. Barnaby and his wife, Eliza S. Barnaby, to Ella Spaulding and her children.

It is alleged that the first conveyance was executed without consideration, and that said John Spaulding did not have any other property subject to execution. It was not necessary to allege that the grantee had notice of the fraudulent purpose of the grantor; for it sufficiently appears that the conveyance was without consideration, and the grantee a mere volunteer. It has long been firmly settled that a voluntary conveyance, made by a debtor who has no other property subject to execution except that conveyed, is fraudulent as to creditors. *O'Brien v. Coulter*, 2 Blackf. 421; *Palmer v. Henderson*, 20 Ind. 297; *Clark v. Cham-*

73	93
132	359
73	93
136	159
136	687
73	93
139	30
139	423
73	93
144	664

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berlain, 13 Allen, 257 ; *Newman v. Cordell*, 43 Barb. 448 ; Bump Fraud. Convey. 197.

Judge STORY thus states the rule, borrowed from the civil law by the common law and the courts of chancery: "Hence, all voluntary dispositions, made by debtors, upon the score of liberality, were revocable, whether the donee knew of the prejudice intended to the creditors or not." 1 Story Eq. Juris., secs. 351, 353, 355. It is true, that, in *Spaulding v. Myers*, 64 Ind. 264, it was held that a complaint, alleging exactly the same facts as those stated in the present, was bad, because it did not aver notice to the grantee, but it is evident that the allegation, that there was no consideration for the conveyance, was not brought to the attention of the court. That case was not very fully argued ; there was, as here, no brief at all from the appellee.

In *Spaulding v. Myers, supra*, the complaint was, except as to parties, precisely like the one under examination, and it was held bad because it did not show that, at the time the second conveyance was made, the debtor who executed the first of the two conveyances had no property subject to execution ; and we think this ruling was correct. If there was property of the debtor, which the creditor could have reached by ordinary legal process, and out of it have secured payment of his debt, there was no reason for wresting this particular property from the grantees in the second conveyance. Before resorting to property conveyed to grantees, even though without consideration, that of the grantor, then subject to execution, ought first to be exhausted. We hold the complaint bad, not because it failed to aver notice on the part of the grantees of the grantor's fraudulent design, but because it is not shown that when the grantees now claiming title received a conveyance, the grantor did not have other property, subject to execution, sufficient to have satisfied the claims of creditors.

Judgment reversed.

Ex Parte Walls.

No. 8678.

EX PARTE WALLS.

ATTORNEY.—Application for Readmission to Practice Law.—Who may Resist.—Statute Construed.—Section 780, 2 R. S. 1876, p. 308, authorizes any person to move to disbar or suspend an attorney from the practice of law, as well as to resist his readmission after he has been disbarred; and, where an attorney, who has been disbarred, applies for readmission, the court has the power to secure a petition against his readmission, and to appoint certain petitioners thereof to resist such application.

SAME.—Office.—The office of an attorney is *quasi* public, and his conduct semi-official, and any one may oppose his admission to practice law, or, if he has already been admitted, may move to suspend or disbar him. and, if suspended or disbarred, may oppose his readmission.

SAME.—Proceeding for Readmission.—Practice.—Assignment of Error.—In proceedings to remove or suspend an attorney from the practice of law, pleadings are required, but not in an application for admission or readmission. Such an application is not a civil action, requiring adversary pleadings, but is made by motion, which may be oral, and sustained or opposed by evidence, without written pleadings, and no available error can be assigned on the rulings of the court on the papers filed therein.

SAME.—Burden of Proof.—In such proceeding, the burden is on the applicant to show his qualification, even if there be no resistance thereto.

SAME.—Jury Trial.—The applicant, in such case, is not entitled to a jury trial, it being a summary proceeding, to be determined by the court.

SAME.—Finding.—The finding by the court, that such applicant, in his business relations outside of his profession, has been honest and upright, is not equivalent to finding that he is a person of good moral character.

SPECIAL FINDING.—Verdict.—What Facts Found.—Practice.—It is not the office of a special verdict or finding to find expressly upon the issues, but only to find the facts proven within the issues.

SAME.—Ventre De Novo.—Record.—If the special finding or verdict is silent in reference to any fact or issue, such silence is not an omission apparent on the record, constituting ground for granting a *venire de novo*.

SAME.—New Trial.—If there was proof pertinent to any issue, on which the court ought to have found facts which are not found, the remedy is by motion for a new trial, on the ground that the finding is contrary to law, but not for a *venire de novo*.

SAME.—Where the finding of facts, in an application for readmission to practice law, does not show, affirmatively, that the applicant was a man of good moral character, nor the contrary, it is equivalent to an adverse finding in that respect.

73	95
134	579
73	95
137	289
73	95
143	204
73	95
144	607

Ex Parte Walls.

From the Boone Circuit Court.

W. B. Walls, S. M. Burke, J. W. Gordon, R. N. Lamb and S. M. Shepard, for appellant.

C. S. Wesner, O. P. Mahan, T. J. Cason and R. W. Harrison, for appellee.

BIDDLE, C. J.—Application by the appellant to be re-admitted to practice law in the Boone Circuit Court, made by motion in writing, in the following words:

“The said William B. Walls comes, and humbly sheweth unto the court, that heretofore, to wit, on the 6th day of September, in the year 1871, he was an attorney at law, duly admitted to the practice of the profession of law as such, in all courts of record, of and in the State of Indiana, and entitled to all and singular the rights and privileges of the said office of attorney at law; that afterwards, to wit, on the 6th day of October, in the year 1877, under and by the order and direction of the Boone Circuit Court, then in session, one Thomas J. Terhune, Esq., was appointed and directed to institute proceedings against him, the said Walls, to remove him from the said office of attorney, and debar him from the practice of his said profession, and afterwards, to wit, on the 4th day of February, in the year 1878, the said Terhune, in pursuance of the order and direction of said court, did institute proceedings against him, said Walls, to remove him from said office of attorney and disbar him as such; and he shows unto the court that the charge in the said complaint against him was, in substance, that he had falsely and corruptly forged, made and uttered, as true and genuine, a certain false and forged affidavit, purporting then and there upon its face to be the true and genuine affidavit of one Jacob L. Green, and to have been made by said Green for the purpose of procuring and obtaining a change of venue in a certain action pending in the Boone Circuit Court, in which the Thorntown District Council of the

Ex Parte Walls.

Patrons of Husbandry was plaintiff, and the said Jacob L. Green was defendant; that he made answer to said complaint, denying each and every allegation thereof so far as the same charged him with any wrongful act; but he says that, upon the trial of said proceeding, he was found to be guilty of the wrongful and improper conduct charged against him in said complaint and proceedings, and was by said court adjudged to be guilty thereof, and suspended from the office of an attorney, and disbarred from the practice of law; and he says that he has ever since been denied the privilege and rights of an attorney, and still is. He says that said trial and judgment took place soon after the charges were first made against him, and that he was not at that time able fully to prepare himself therefor, and was surprised by the testimony of William I. Sutton, who testified that he, said Sutton, did not make the affidavit and swear to it, which he, said Walls, was charged with having falsely made and uttered. Whereas he, the said Sutton, had made said affidavit and sworn to it, although the same was written in the name of, and subscribed by the name of, said Jacob L. Green, and upon the face thereof appeared to be the affidavit of said Green, and the same was so made in the name of said Green upon its face, in the hurry of business and by mistake; whereas it was in fact written for and was subscribed by said Sutton with his mark and sworn to by him, and was in fact the genuine affidavit of said Sutton, and was uttered by your petitioner in good faith, and not as a false, forged and counterfeit affidavit, or with any thought, intent or purpose whatever to cheat or deceive said court. And he avers that after the said affidavit was so made, uttered, published and used by him, he was indicted in the Boone Circuit Court upon and for the charge and crime of perjury, in swearing upon the trial of said proceedings against him to disbar him, that said Sutton subscribed said affidavit, and that it was a genuine affidavit of said Sutton; and he says

Ex Parte Walls.

that he appeared to said indictment and pleaded not guilty thereto, and for trial thereof put himself upon the country; and afterwards, to wit, on the 22d day of February, in the year 1879, in the said Boone Circuit Court, he was by a jury of his country found not guilty of said crime of perjury, and fully acquitted and discharged thereof and therefrom by said jury, by their verdict duly found and returned into open court, and by the judgment of the court thereon; and he now avers and charges that said prosecution upon said indictment involves the same issues in effect and fact as those involved in the charge brought against him to disbar him, and that upon the trial of said indictment he was able to prove facts which tended to prove, and did prove, that said Sutton had made the affidavit which was in controversy in the proceedings brought against him to disbar him; all of which evidence he was not able to prove upon the trial in that proceeding, owing to the recentness of said charge and the confusion resulting from the surprise occasioned by the testimony of said Sutton; and he says that said testimony, so by him procured up the trial of said indictment, was true, and still is true, and that the denial of said affidavit and the making thereof by said Sutton is not and was not true. And he says that he was wrongfully suspended from the office of attorney at law and disbarred from the practice of his said profession, when he ought not to have been, by reason of his innocence of the charge in said complaint filed against him by said Thomas J. Terhune, Esq., under the direction of said court; and, as he humbly conceives, he is fairly entitled to be restored to the practice of his profession, and to all and singular the rights and privileges pertaining to the office of attorney and counsellor at law.

“He says that he is a male person, over the age of twenty-one years, and a resident and elector of Boone county, and State of Indiana, and that he is a man of good moral character, and, as such, entitled to be admitted to practice law

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and to enter upon the office and duties of an attorney at law ; and in support of this last allegation he herewith files the affidavits of the following named persons : J. W. Nichol, J. H. Blackburn, A. Robinson, James W. Garner, William L. Gregory, Charles S. Riley, B. W. Stewart, D. M. Henry, A. G. Porter, James A. Nay, T. A. Andrews, Isaac Robinson, Abner H. Shepherd, James W. Cavin, William H. Harrison, Bradford Epperson, James Bragg, John A. Hysong and William Edwards, and makes each of them a part hereof. And he prays that he may be reinstated to the office of attorney, and to all and singular the rights and privileges thereof, and, as in duty bound, he will ever pray.

“WILLIAM B. WALLS.

“By HILL & NICHOL, his attorneys.”

The petition was sworn to by the applicant. The affidavits referred to in it were filed as exhibits with it.

Upon the petition of twenty-one practicing attorneys of the Boone Circuit Court, alleging objections to the readmission of the applicant, the court appointed, of their number, C. S. Wesner, R. W. Harrison, T. J. Cason and Oliver P. Mahan to appear and resist the appellant's motion for readmission to the bar, to which the appellant excepted. They alleged in writing, and filed, thirty-five objections to the readmission of the appellant. As the court in its special finding has referred to several of these as being found true, it becomes necessary to simply state such of them as the court did not strike out, which may be done, in substance, as follows :

II. That the petitioner is a man of bad moral character.

III, IV, V, VI, VII, XX and XXI. The petitioner wrote, and caused to be published in the Indianapolis Journal and Herald, a false and slanderous charge against Judge Truman H. Palmer, in the month of May, 1878, which charge is set forth.

IX. That the petitioner, in 1874, while prosecuting at-

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torney, accepted two notes for \$25 each, from two persons named Waugh, and agreed to clear them of a criminal charge for the same.

X. That the petitioner, while prosecuting attorney, in 1874, represented to Charles McLain, that he, McLain, was indicted, and obtained five dollars of McLain to clear him of the charge.

XII. That the petitioner, while prosecuting attorney, in the year 1874, was in the habit of receiving bribes.

XIII. That the petitioner, as the attorney for Martha J. Crouch, in the case of *C. C. Galvin v. Martha J. Crouch*, in the Supreme Court, offered to confess errors, and let the case be reversed, for one hundred dollars.

XIV. That the petitioner, in the month of May, 1878, had a conversation with H. C. Wills, in which he, the petitioner, said that what he had published in the Herald about Judge Palmer was true.

XV. That the petitioner, while an attorney at law, wrote a waiver of service, without authority, and caused a judgment to be taken against Orvilla Dampier and others, in favor of William Dampier.

XVI. That the petitioner, while an attorney at law, withdrew his appearance from a cause, and, for so doing, received \$25 from the adversary of his client.

XVII. That the petitioner took a receipt from S. I. Gilham, in the year 1875, for fifty dollars, and afterward changed said receipt so as to read two hundred and fifty dollars.

XIX. That the petitioner is a man of bad moral character for honesty.

XXII. That the petitioner has been indicted eleven times in the Boone Circuit Court.

XXIV. That the petitioner, while an attorney at law, counselled unjust actions and defences.

XXV. That the petitioner, while an attorney at law,

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drew a note payable in bank, secured by mortgage, when the mortgage was intended to be an indemnifying mortgage only.

XXVIII. That the petitioner, in the year 1874, testified falsely before J. R. Crigler, a justice of the peace.

XXXI. That the petitioner attempted to intimidate Dr. Garrison, L. O. Sering and Rebecca Sering, from testifying against him in this cause.

XXXII. That the petitioner procured a release from Eliza C. Haas, releasing him from a debt of \$12.50, by stating to her that the debt was not just, and that he could prove he did not owe it.

XXXIV. That the petitioner testified falsely before Solomon Witt, Esq., in a case wherein Watson Workman was plaintiff, and Lane & Walls were defendants.

XXXV. That the members of the Lebanon bar do not fear the petitioner's strength and ability as a lawyer, and that petitioner was, while an attorney at law, abusive to the opposing counsel.

To the remaining specifications against him, the appellant filed a demurrer, for want of sufficient facts; the demurrer was overruled, and exceptions reserved. He then filed a general denial and several special paragraphs of answer, upon which various rulings were had, which, as we view the the case, need not be stated.

The appellant demanded a jury to try the facts of the case; his demand was denied, and exception reserved. He then moved the court to make a special finding of the facts proved, and state the conclusions of law thereon, which the court did, as follows:

"1st. That William B. Walls, the petitioner herein, was regularly admitted to practice law in this court, on the 6th day of September, 1871.

"2d. That, on the 4th day of February, 1878, Thomas J. Terhune, an attorney of this court, under its order and di-

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rection, prepared and prosecuted an accusation against said Walls, charging him with preparing and presenting to the court, in a cause then pending therein, and in which he appeared as an attorney, a false and forged affidavit for a change of venue, and with procuring an order of the court, upon said affidavit, changing the venue in said cause.

“3d. That the proceedings under said accusation resulted in a verdict of guilty, and a judgment of the court thereon, suspending the petitioner from the practice of the law.

“4th. That, on the 16th day of May, 1878, and a few days after the judgment against the petitioner was rendered, there appeared in the Indianapolis Journal, a daily newspaper, published in the city of Indianapolis, charges against Hon. Truman H. Palmer, then judge of this court, purporting to have been made by the petitioner, among which charges was one to the effect that Judge Palmer was guilty of taking a bribe of \$1,000, to influence his decision in the case of *The State v. Clem*, in the Boone Circuit Court, and which was given him by the petitioner, for the defendant in the case; the petitioner then being official prosecutor in said court and charged with the prosecution of the said cause.

“5th. These charges were published as coming from the petitioner, and he now denies that he made them or authorized the publication.

“6th. That, on the 18th day of May, 1878, Judge Palmer caused to be published, in the same newspaper, an answer to these charges, in which, among other things, he charged the petitioner with being a well known bribe-taker, forger and perjurer.

“7th. That, on the 20th day of May, 1878, and while, as he now says, he was smarting under the attack made upon him by Judge Palmer, the petitioner wrote an article, addressed to the editor of the Journal, and caused it to be published, as an advertisement, in the Indianapolis Herald, a weekly newspaper, published at Indianapolis, Indiana, in

Ex Parte Walls.

which he said, referring to the previous publication in the Journal, and the charges therein made, that such charges were true, and that he had simply stated that which was true.

“8th. In the publication last mentioned, the petitioner distinctly charged, among other things, that he, as prosecutor, and Truman H. Palmer, as Judge, had agreed between themselves to have the case of *The State v. Clem* dismissed, and the defendant set at liberty ; and that, as an inducement to the judge, the petitioner obtained money from the defendant and gave it to the judge, after which the petitioner, in said publication, said, ‘I held Palmer, and used him as a potter would his clay.’

“9th. After this, the petitioner publicly charged, in the presence of numerous persons, citizens of Lebanon, Indiana, that Judge Palmer had accepted a bribe in the Clem case ; and also stated that he, Walls, had also received money from the defendant, in a larger sum than that received by the judge ; that he did not divide even with the judge, and that those who knew him ought to know that he would take care of himself.

“10th. That, while petitioner was the official prosecutor of the Boone Circuit Court, there was a criminal charge made against two persons named Waugh, pending in said court, and the petitioner procured each of said persons to execute to him a promissory note for \$25, for which he promised to clear them of the charge against them.

“11th. That, while petitioner was a practicing attorney of said Boone Circuit Court, he instituted an action therein, in favor of William Dampier, against Josiah Dampier, Orvilla Dampier and others, to enforce a vendor’s lien ; that the defendants, Dampier, were non-residents of this State ; that the petitioner procured a summons to issue against said defendants, and wrote thereon a waiver of service, signing thereto, without authority, the names of said non-resident defendants, by writing the names and affixing a mark, as their

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mark, and afterward filed such summons and the waiver of therein, in court, in said cause, and proceeded to take a decree against said defendants.

“12th. That, in a paper filed in this cause at this term of court, the petitioner used unjustifiable and grossly disrespectful language concerning Hon. J. G. Adams, judge of the 19th Judicial Circuit, who was called to hear a motion made by the petitioner, at a previous term of this court, to be reinstated as an attorney at law, which language was used concerning the conduct of said judge while hearing such motion.

“13th. That, during the progress of the present hearing of this motion, the petitioner, while conducting his own cause, unnecessarily indulged in offensive personality, prejudicial to the reputation of a witness in the cause.

“14th. That at no time since the making thereof, until after the hearing of this motion began, has the petitioner ever retracted the charges made against Judge Palmer, or expressed any regret that he made them; nor until such time did he deny his connection with the alleged act of bribery.

“15th. That on the 14th day of April, 1880, and during the hearing of this motion, the petitioner filed a paper in this cause, in which he fully and completely retracted his charges of bribery against Judge Palmer, and afterwards made such retraction under oath as a witness.

“16th. That, as a witness in this cause, the petitioner admitted, under oath, that while he was prosecuting attorney, charged with the prosecution of the case of *The State v. Clem*, in which the defendant was charged with murder, he sought Judge Palmer, then judge of the court in which the cause was pending, at the request of the defendant, to ascertain whether he would entertain a motion to dismiss the case or admit the defendant to bail, and reported the result of his interview to the defendant.

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“17th. That in his business relations, outside of his profession, the petitioner has been upright and honest.

“18th. That his general reputation for morals is not good.

“19th. That his general reputation has principally grown out of matters connected with his conduct while a practicing lawyer.

“20th. And the court finds generally, that the objections to the readmission of the petitioner, filed in this cause and numbered 3, 4, 5, 6, 7, 9, 14 and 15, are true.

“21st. That, as to all the charges not herein specially or generally found against the petitioner, the court finds in his favor, and that the charges were not proven.

“22d. That the applicant is now an adult male inhabitant of said county, and a voter therein.

“And the court finds as its conclusions of law from the foregoing facts, that the petitioner ought not to be reinstated in the profession and practice of law.

“T. F. DAVIDSON, Judge.”

The appellant excepted to the conclusions of law upon the facts found, and also moved for judgment in his favor on the special facts found by the court.

Several other motions were made at this stage of the proceedings, and acted upon by the court; but, as the appellant in his brief does not insist upon the rulings thereon as error, we do not state them.

The appellant makes thirteen points in his argument. The *First*, *Second* and *Third* points go to the power of the court in securing the petition of certain persons, opposing the readmission of the appellant, and to the power of the court in appointing certain of said persons to resist the same. It is insisted that the court possessed no such power. We think it did. The code enacts as follows:

“SEC. 780. The proceedings to remove or suspend an attorney may be commenced by the direction of the court,

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or on motion of an individual. In the former case, the court must appoint some attorney to draw up and prosecute the accusation ; in the latter case it may be drawn up by any person, and sworn to by the person making it.”

This plainly grants the power to any person to move for the removal or suspension of an attorney, and carries with it the implied power to resist the readmission of an attorney, after he has been suspended, to practice law. To hold that any person may move and prosecute an attorney to removal or suspension, and that no person can oppose his readmission after suspension, would be an incongruity. The office of an attorney is *quasi* public, and his conduct *semi*-official. All persons are interested in his rectitude, and any person may oppose his admission to practice law, or, if he has already been admitted, may move to suspend or disbar him, and, if suspended or disbarred, may oppose his readmission. The proceedings for admission or readmission to practice are at first necessarily *ex parte*, and, if no one had the right to oppose either, the proceedings would remain *ex parte*, and be liable to great abuse. The court did not err in any of its rulings on these questions.

The *Fourth, Fifth, Sixth, Seventh* and *Eighth* questions, discussed by the appellant in his brief, go to motions made, and demurrers filed, to the petition and the specifications in the defence.

The parties seem to have treated the proceedings as a civil action, requiring adversary pleadings. We take a different view of the case. It is merely an application by motion, which may be made even orally, and sustained or opposed by evidence, without any written pleadings. It is plain, therefore, that there could be no available error in the rulings of the court on the papers in the case, when no papers are required. We do not mean to condemn the practice of making such an application in writing, nor of stating the defence in writing ; on the contrary, it is commendable,

Ex Parte Walls.

though not necessary. In proceedings to remove or suspend an attorney, pleadings are required, but not in applications for admission or readmission.

Ninth. The appellant thinks the court erred in denying him a jury to try the questions of fact. We think otherwise. It is not a civil action within the meaning of the common law, but simply a summary proceeding, to be determined by the court. Neither the constitution nor the statute gives the right of trial by jury in such a case, and it did not exist at common law. But in a case to remove or suspend an attorney, when pleadings are required, and a trial may be had as in other cases, the accused is entitled to a jury. 2 R. S. 1876, p. 308, sec. 780. As to cases wherein the parties have not the right to demand a jury, see the following authorities: *The Lake Erie, Wabash and St. Louis Railroad Co. v. Heath*, 9 Ind. 558; *Baker v. Gordon*, 23 Ind. 204; *Reily v. Cavanaugh*, 32 Ind. 214; *Hopkins v. The Greensburg, Knightstown and Clarksburg Turnpike Co.*, 46 Ind. 187; *The Logansport, Crawfordsville and South-Western Railway Co. v. Patton*, 51 Ind. 487; *Allen v. Anderson*, 57 Ind. 388; *Houston v. Bruner*, 59 Ind. 25.

Tenth. That the court erred in its conclusions of law on the facts found, is insisted upon at great length by the appellant. By the constitution, "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice." Const., sec. 21, art. 7. This presents the sole question in the case. When the appellant filed his application, and the facts therein stated were denied, he put the fact that he was a person of good moral character in issue; and, to entitle him to admission, it was necessary that the court should find that fact to be true. It is claimed, however, that the court has so found by finding that the appellant, in his business relations outside of his profession, has been honest and upright. This is not equivalent to finding that he is a person of good moral

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character. It requires much more than mere honesty and uprightness in business relations outside of a profession, to constitute a good moral character. Such business relations might admit even of the grossest misconduct and immorality in the practice of his profession, and does not exclude even crime. Besides, the finding immediately adds, "That his general reputation for morals is not good." It is impossible to fairly say, from the facts stated in the finding, that the appellant was a person of good moral character at the time he made his application for readmission.

We can not see wherein the court erred in its conclusions of the law as applicable to the facts stated in the finding.

Eleventh and Twelfth. These points are not discussed in the appellant's brief, and must therefore be held as waived.

Thirteenth. It is claimed, finally, that the court erred in overruling appellant's motion for a judgment in his favor on the special facts found by the court.

This question has already been decided under the *Tenth* proposition; for, if the facts found did not entitle the appellant to readmission, it follows that to overrule his motion for a judgment in his favor was not erroneous.

The judgment is affirmed, at the costs of the appellant.

ON PETITION FOR A REHEARING.

WOODS, J.—It may be conceded, as claimed by counsel for the appellant, that, in the case at bar, the only issue was this: Is said Walls a voter and a person of good moral character? and that the inquiry had reference to the date of the motion for readmission, and of the hearing thereon.

The burden of this issue was on the appellant; and this was so, even if there had been no resistance to the application. It is not apparent that the issues could have been so formed, or such an admission made, as to relieve him of this burden. All pertinent facts, for and against him, were provable

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without special petition, plea or reply, and, if any of the facts specially pleaded against, or those found either for or against him, are irrelevant, they constitute only surplusage, immaterial and harmless, on which no available assignment of error can be predicated.

Upon the request of the appellant, the court made a special finding of facts, and stated its conclusion of law thereon. These are set out with sufficient fulness in the original opinion. Whether the appellant was entitled to claim such a finding, we need not decide. Having requested it, and the court having granted it, the case must be disposed of by the rules applicable to such findings.

Two propositions are now pressed upon our attention: First, that the finding shows that the appellant was a voter and a person of good moral character, and, therefore, entitled to an order for readmission; and, Second, that the finding is defective, in not showing whether he was or was not a person of good moral character, and that, consequently, a *venire de novo* should have been granted.

In support of the first proposition, much stress is laid upon the finding, "that, as to all the charges not herein specifically or generally found against the petitioner, the court finds in his favor, and that the charges are not proven;" and counsel say that "among these" (so found in favor of the petitioner) "stands cause 19. The said William B. Walls is not a person of good moral character, but, on the contrary thereof, is a person of bad moral character."

This part of the finding can not, by any fair interpretation of its terms, and certainly not in the light of all that is specifically found, be construed to embrace said "Cause 19," which, in fact, is no charge at all, but amounts only to a denial of the petition. It may be, as is claimed, that the facts specially found are mainly items of evidence only, and that they relate directly to occurrences and transactions which happened some time before the filing of the petition,

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but, nevertheless, they were pertinent to the issue. They tend to show the character of the man, and, in the light of all that is found, it would be a singular standard, by which it could be claimed that this finding shows the appellant to be a man of good moral character.

The second proposition can not be maintained. In the case of *Graham v. The State, ex rel.*, 66 Ind. 386, the office of a special verdict or a special finding of facts was carefully considered; and it was there determined that the facts to be stated in such finding or verdict were those which had been proved on the trial, and none other; that if there were issues in a case, on which no evidence was offered, no finding should be made in reference thereto, and that the issues concerning which no facts were found should be regarded as not proved by the party on whom was the burden of the issue or issues. This case has been approved and followed in several cases decided at this term. *Martin v. Cauble*, 72 Ind. 67; *Vannoy v. Duprez*, 72 Ind. 26; *Stropes v. The Board, etc.*, 72 Ind. 43.

There was, before the decision of the case of *Graham v. The State, supra*, some confusion and conflict in the cases on this subject. See *Schmitz v. Lauferty*, 29 Ind. 400; *Cruzan v. Smith*, 41 Ind. 288; *Dehority v. Nelson*, 56 Ind. 414; *Whitworth v. Ballard*, 56 Ind. 279; *Anderson v. Donnell*, 66 Ind. 150, and the cases referred to. But these cases should be deemed modified or overruled so far as inconsistent with the doctrine now settled, that it is not the office of a special verdict or finding to find expressly upon the issues, but only to find the facts proven within the issues. The inevitable corollary proposition is, that, if the special finding or verdict is silent in reference to any fact or issue, such silence is not an omission apparent on the record, which can be ground for granting a *venire de novo*. If in fact there was proof pertinent to any issue on which the court ought to have found facts which are not found, the remedy

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must be by a motion for a new trial, on the ground that the finding is contrary to law. If pertinent and material facts are proven, but the court does not find upon them, and thereby impliedly finds that they are not proven, the finding in such respect is clearly contrary to law, and there is good cause for a new trial, but not for a new *venire*.

The application of this rule to the case under consideration is plain. If, as counsel so vigorously contend, the finding of facts does not show affirmatively that the appellant was a man of good moral character, nor the contrary, it is equivalent to an adverse finding in that respect; and we certainly can not say on the evidence that the finding is wrong.

Petition overruled, with costs.

No. 6834.

ELBERT ET AL. v. HOBY.

73	111
137	86

PRACTICE.—*Misconduct of Juror.*—*Bill of Exceptions.*—*Supreme Court.*—

Affidavits concerning alleged misconduct of jurors must be made a part of the record by a bill of exceptions or order of court, to present any question thereon in the Supreme Court.

From the Hamilton Circuit Court.

W. T. Jones, S. J. Wright, H. Jordan and L. Jordan,
for appellants.

WOODS, J.—We are asked to reverse the judgment in this case solely on the alleged misconduct of jurors, but the affidavits concerning that misconduct are not made a part of the record by a bill of exceptions, or by an order of the court. There is therefore no question properly presented for our decision. See *McDaniel v. Mattingly*, 72 Ind. 349, and cases cited.

Judgment affirmed, with costs.

 Wiseman et al. v. Wiseman.

No. 7628.

WISEMAN ET AL. v. WISEMAN.

HUSBAND AND WIFE.—*Interest of Surviving Wife in Real Estate of Husband.*—Under the statute of this State, a surviving wife, who has not conveyed or relinquished her interest in the property of her husband, accepted a jointure, or received a valid antenuptial settlement, can not be deprived of her rights in the lands of her deceased husband, unless, at the time of his death, she was living apart from him in adultery.

SAME.—*Marriage.*—Nothing but death, or a judicial decree, can dissolve the marriage tie.

SAME.—*Partition.*—*Widow Incompetent Witness.*—Under the act of March 11th, 1867, 2 R. S. 1876, p. 132, a surviving wife is not a competent witness, in her own behalf, in an action for the partition of the lands of her deceased husband, against the other heirs or devisees, as to matters which occurred prior to the death of her husband.

SAME.—*Presumption.*—The testimony of an incompetent witness is presumed to have been an injury to the adverse party.

From the Hamilton Circuit Court.

D. Moss, A. F. Shirts, G. Shirts, and W. R. Fertig, for appellants.

T. J. Kane and T. P. Davis, for appellee.

ELLIOTT, J.—Petition for partition by the appellee, wherein she asserted title to one-third of certain real estate, alleging that she derived title as the widow of her deceased husband, John Wiseman, and averring that the defendants claimed title by devise from their father, the said John Wiseman, deceased.

The appellants answered in four paragraphs, the first of which was a general denial, and the others pleaded affirmative matter in confession and avoidance. To all but the first paragraph demurrers were sustained, and of this ruling the appellants first complain.

It is not necessary to state with much particularity the facts pleaded, for the question of law arising upon the answer may be fully stated and clearly comprehended from a brief synopsis of the facts pleaded by the appellants. The

73	112
142	88
73	112
149	159

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second paragraph charges that the appellee wrongfully abandoned her husband; that after such abandonment the husband went to Pennsylvania, whither the wife had fled, and endeavored to persuade her to again live with him; that she refused, cruelly treated him, and caused him to be cast into prison; that she extorted from him a written contract, and that all the property of which the appellants' father died seized has been acquired since the execution of said contract and while the appellee was living apart from her husband. The written agreement is made part of the answer, and is substantially a contract of separation, wherein the husband releases to the wife certain property then owned by the wife, as well as that which she may afterwards acquire, and also transfers to her a certain bond. There is, however, no provision that the said Sarah shall relinquish any rights in or to the property of her husband. The third paragraph of the answer avers wrongful abandonment and concealment of residence, by the appellee, from her husband for more than forty-eight years. The fourth paragraph combines the material allegations of the second and third, and goes more into detail.

One general rule determines the question of the sufficiency of all these answers, and that rule, shortly stated, is: Under our statute, a surviving wife, who has not conveyed or relinquished her interest in the property of the husband, or accepted a jointure, or received a valid antenuptial settlement, can be deprived of her rights in the lands of her deceased husband for one cause, and for one cause only, and that is the cause prescribed in the 32d section of the statute of descents, 1 R. S. 1876, p. 413. The right of a surviving wife can only be defeated by showing that at the time of the husband's death she was living apart from him in adultery. *Shaffer v. Richardson's Adm'r*, 27 Ind. 122. Our statute is imperative, its words are mandatory; the surviving wife *shall* take an interest in the lands of the deceased husband. The

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only cause which will bar this right is the one just named. It is useless for counsel, and it would be equally so for the court, to expatiate upon the injustice of a rule which will allow a wife who has lived apart from her husband for nearly half a century to come in at his death and seize one-third of the property accumulated by him during the time she lived in concealment from him. With the Legislature such an argument might have weight; with us it can have none. An all-sufficient answer from us is, "*Ita lex scripta est.*"

A woman who has been divorced from her husband can not, of course, be deemed a surviving wife, but, unless there has been a judicial decree, dissolving the marital relation, the wife who outlives her husband is the surviving wife, no matter how bad her conduct may have been. This was the doctrine of the common law, and is thus well stated by Chancellor KENT: "If there be no statute regulation in the case, the principle of the common law, and not only of England, but of the Christian world, is, that no length of time or absence, and nothing but death, or the decree of a court confessedly competent to try the case, can dissolve the marital tie." 2 Kent Com. 80; *Roche v. Washington*, 19 Ind. 53.

The motion for a new trial, and assignment of error based on the overruling thereof, present the question of the competency of the appellee to testify as a witness, in her own behalf. The act of March 11th, 1867, was in force at the time of the trial, and the appellant insists that, under the second proviso of the 2d section of that act, the appellee was not a competent witness, and that the court erred in permitting her to testify. The statute relied upon has often been passed upon by this court, and has been so construed as to require us to hold with the appellants. The provision of the statute referred to provides "That in all suits by or against heirs, founded on a contract with or demand against the ancestor, the object of which is to obtain title to or pos-

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session of land or other property of such ancestor," neither party shall be a witness. In *Baker v. Baker*, 69 Ind. 399, it was held, in a suit for partition, that the defendants were not competent witnesses, and the case of *Hunter v. Miller*, 17 Ind. 88, was approved. In the case of *Pea v. Pea*, 35 Ind. 387, a widow, claiming an interest in lands of her deceased husband, was declared to be incompetent to testify against one with whom, it was alleged, the husband had contracted concerning the lands. The statute again came under examination in *Thompson v. Mills*, 39 Ind. 528, and it was there held that such a partition was both an action by and against heirs, and the parties were not competent witnesses. *Peacock v. Albin*, 39 Ind. 25, is a still stronger case in favor of appellant. In the case just cited, the court said: "We are clearly of the opinion that the word 'heirs' as used in the above proviso was intended to include all persons, whether they took the estate under the law or by virtue of a will, in all cases where the devisee or legatee would have taken any portion of the estate under the statute of descents. Any other construction would be narrow and illiberal." In *Malady v. McEnary*, 30 Ind. 273, the same general doctrine is declared, and the case of *Shaffer v. Richardson's Adm'r*, 27 Ind. 122, relied on by the appellee, declared not to be applicable to the statute of 1867. In *Cravens v. Kitts*, 64 Ind. 581, the court reviewed the authorities, and declared the surviving wife to be an incompetent witness in actions for partition (*vide* authorities cited on p. 590). There are other cases in which the statute is given a construction much in harmony with the view enforced by the cases cited. *Skillen v. Skillen*, 41 Ind. 260; *Sherlock v. Alling*, 44 Ind. 184. All the cases evince a decided intention to so construe the statute as to exclude parties, in all cases where the property is derived from a deceased ancestor, or where the rights of a decedent's estate are affected. The cases are clearly right, which hold the wife incompetent in such actions as the pres-

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ent; for that she claims as heir of her deceased husband has been so often decided, that a citation of authorities is unnecessary. Nor does the surviving wife's right to testify depend upon whether there was or was not a contract with the husband. The word "demand" is used in this statute as a noun, and, so used, is a word of broad meaning. Lord COKE says it is the largest word in the law, except claim. Coke Litt. 291 b. The word has been assigned a very broad meaning by the courts, in all cases where it has been necessary to interpret an instrument or statute in which it is contained. *Vedder v. Vedder*, 1 Den. 257; *Marks v. Marriott*, 1 Ld. Raym. 114; *The Mayor, etc., v. Lord*, 17 Wend. 285; *Henry v. Henry*, 11 Ind. 236. A statute with such comprehensive language may well be deemed to include the case of a surviving wife, asserting a claim to the lands of her deceased husband, and against children whom he has made his devisees.

The appellee insists that if there was error in the ruling permitting her to testify in her own behalf, it was a harmless one, because the same facts were proved by many other witnesses and were, in truth, substantially without contradiction. It is true, that the principal facts testified to by Mrs. Wiseman are, in the main, proved by other testimony, but there are some details of importance which no other witness states. We can not say that the ruling is so plainly harmless as to permit us to hold that it worked the appellants no substantial injury. Nor, where parties voluntarily put on the stand an incompetent witness, ought courts to very closely scrutinize the evidence to find whether injury was done the adverse party; the presumption is that the testimony of an incompetent witness did do harm.

The testimony of Mrs. Wiseman was not, as appellee contends, confined to the single question of heirship; it went much beyond that question. The facts concerning the marriage, the separation, the abandonment, as well as that

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no divorce was ever obtained, were all testified to by the appellee when testifying as a witness in her own behalf.

It is also insisted that the court erred in excluding evidence that the deceased had for a great number of years lived and cohabited with one Elizabeth Wiseman as his wife. There was no error in this. It would have availed nothing to have proved the ancestor guilty of living in adultery with the woman named.

For the error in permitting the appellee to testify in her own behalf as to matters which occurred prior to the death of John Wiseman, we must reverse the judgment.

Judgment reversed, at costs of appellee, with instructions to sustain appellants' motion for a new trial.

Petition for a rehearing overruled.

7777.

THE TOWN OF BROOKVILLE v. GAGLE.

TOWN.—Ordinance.—Violation of.—Complaint.—A complaint to recover the penalty for a violation of a town ordinance is sufficient, where it contains averments of the proper enactment of such ordinance, the violation of its provisions by the defendant, and the acts constituting such violation.

SAME.—Civil Action.—Common Law.—Actions to recover penalties for the violation of ordinances of municipal corporations are civil actions. At common law penalties for the breach of by-laws were recoverable either in debt or assumpsit.

SAME.—Circuit Courts.—Jurisdiction.—Circuit courts have jurisdiction of actions for the recovery of a penalty for the violation of a town ordinance.

From the Franklin Circuit Court.

J. F. McKee and *D. W. McKee*, for appellant.

W. H. Bracken, for appellee.

73	117
126	598

73	117
1170	156

The Town of Brookville v. Gagle.

ELLIOTT, J.—This appeal presents the question of the sufficiency of the complaint filed by the appellant against the appellee.

The allegations of the complaint are, in substance, as follows: Appellant is an incorporated town. Its board of trustees adopted an ordinance requiring licenses from all persons exhibiting shows of any kind. The ordinance, omitting title, is as follows:

“SECTION 1. Be it ordained by the president and board of trustees of the town of Brookville, Indiana, that any person or persons, before exhibiting for pay within the corporate limits of said town of Brookville, Indiana, any caravan, menagerie, circus, rope or wire dancing, legerdemain or puppet show, or show of any kind, shall pay to the marshal for the use of said town the sum of ten dollars for each day of such exhibition.

“SEC. 2. Any person or persons, violating the provisions of this ordinance, shall, upon conviction, be fined in any sum not exceeding ten dollars.”

The appellee was the owner of a “show,” which he exhibited for pay within the corporate limits of said town; that he failed and refused to pay the license required by the town ordinance, and that he did exhibit such show for pay without having paid any license fee whatever.

The complaint contains all the averments necessary to create a cause of action upon the ordinance declared on. The proper enactment of the ordinance, the violation of its provisions by the appellee, and the acts constituting the violation, are all fully pleaded. Actions for the recovery of penalties for the violations of ordinances of municipal corporations are civil actions. *The City of Greensburgh v. Corwin*, 58 Ind. 518; *The City of Goshen v. Croxton*, 34 Ind. 239. At common law, penalties for the breach of by-laws were recoverable either in debt or assumpsit. 1 Dill. Munic. Corp., sec. 342. All the elements of a good cause of action

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are stated in the complaint of appellant, and it was, therefore, error to sustain the demurrer of appellee.

We are without any brief from appellee, and are not informed as to the grounds upon which the court below rested its ruling. We gather from appellant's argument, that one ground was, that the penalty for each day's violation was recoverable in a separate action. If this were true, a point we need not, and do not, decide, it would not support the ruling, for the complaint was certainly good as to one day's offence, at least.

The only doubt which can be plausibly suggested upon any question in this case is as to the jurisdiction of the circuit court. Section 57 of the general act for the incorporation of towns provides that "Any person violating the provisions of any ordinance of a town organized under this act, to which there may be a penalty affixed, may be prosecuted before a justice of the peace of such town, upon a warrant issued by such justice." If the question were an open one, it might well be held that this section conferred exclusive jurisdiction upon justices of the peace, but the question was closed by the decision in *Redden v. The Town of Covington*, 29 Ind. 118. It was there said: "It is conjectured that the objection to the jurisdiction is based upon the 57th section of the act for the incorporation of towns, by which it is enacted that suits for the violation of ordinances 'may be prosecuted before a justice of the peace of such town.' 1 G. & H. 631. This language, however, does not exclude the jurisdiction of the circuit court, a tribunal which, by another act, is vested with exclusive jurisdiction of certain cases, and with concurrent jurisdiction in all other civil actions, 'except as otherwise provided by law.' "

Judgment reversed, at costs of appellee.

Hahn *et al.* v. Behrman, Executor.

No. 6483.

HAHN ET AL. v. BEHRMAN, EX'R.

NAMES.—Parties.—Demurrer.—Supreme Court.—Where, in a complaint, the surname only of a party is given, such defect can not be reached by demurrer for want of facts; nor can objection for such defect be raised, for the first time, in the Supreme Court by an assignment as error of the want of sufficient facts to constitute a cause of action.

MORTGAGE.—Foreclosure.—Equities of Subsequent Purchasers of Real Estate.—Where suit is brought for the foreclosure of a mortgage on real estate which, after the execution and record of such mortgage, or with notice thereof, has been encumbered or conveyed in different parcels, at different dates, in favor of or to different persons, and the junior encumbrancers, or grantees, are defendants to such suit for foreclosure, the different parcels of such real estate, so encumbered or conveyed by the mortgagor before such foreclosure, will be ordered to be sold in such parcels for the payment of the mortgaged debt, in the inverse order of such junior encumbrance or conveyance thereof by the mortgagors.

SAME.—But, if, at the time of the foreclosure, the original mortgagor owned any part or parcel of the mortgaged property, free from any junior encumbrance thereon, such part or parcel must be ordered to be sold first, for the payment of the mortgage debt and costs, before any sale can be made of any other part or parcel of the mortgaged premises.

From the Ripley Circuit Court.

G. Durbin, for appellants.

W. D. Willson, C. H. Willson and *A. Stockinger*, for appellee.

Howk, J.—On the 13th day of December, 1876, Herman Dieckman, the appellee's testator, then in full life, but since deceased, as sole plaintiff, commenced this action against Henry Hahn, John B. Heinekamp, Ernst Blank, Joseph Herman and Bernhard Klie, the appellants, and Sarah E. Bodley and a number of other persons, as defendants. The object of the suit was to foreclose a certain mortgage, executed on the 19th day of March, 1861, by Herman Schrader and Henry Boehringer to John Hartman, on certain real estate in Ripley county, and to collect the balance of the mortgage debt, then owned by and due to the plaintiff, Dieckman. It

73	120
129	599
73	120
140	147
73	120
150	594
73	120
166	655

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was alleged, *inter alia*, in plaintiff's complaint, that the mortgage in suit was duly recorded, on the 10th day of May, 1861, in the recorder's office of said Ripley county; that, after the execution of said mortgage, the said Boehringer conveyed all his interest in the mortgaged real estate to the defendant Herman Schrader; that long afterward, on August 30th, 1871, the said Schrader and his wife executed a mortgage, on a part of the same real estate, to the defendant Sarah E. Bodley; that the said Schrader and Boehringer laid out and platted a part of the said mortgaged real estate in town lots and streets, and, on August 17th, 1869, they caused the plat thereof to be recorded in the recorder's office of said county, as Boehringer's addition to the town of Batesville, in said county; and that the purchasers of the said town lots, and the said Sarah E. Bodley, had each and all acquired their respective interests in the said mortgaged premises, after the execution and record of the mortgage in suit, and with notice thereof.

The defendant Sarah E. Bodley separately answered the complaint by a general denial thereof; and she also filed a cross complaint against all her co-defendants, and the plaintiff, Dieckman, praying therein for certain equitable relief. To the said cross complaint, the above named appellants jointly demurred, for the alleged insufficiency of the facts therein to constitute a cause of action, which demurrer was overruled by the court, and to this ruling they excepted.

The said appellants, for answer to the plaintiff's complaint, said that they knew nothing about the matters alleged therein, but that, subsequent to the execution of the mortgage sued on by the plaintiff, they had bought, paid for, and taken deeds for, from the defendant Schrader, the town lots owned by them respectively, as stated in the complaint, and they asked that the residue of the mortgaged premises might be sold, under the order of the court, for the satisfaction of the mortgage debt, before the said town lots, owned by them

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respectively, should be offered for sale for such purpose. They failed and refused to answer further the cross complaint of said Sarah E. Bodley.

Upon the trial of the cause, the court found and rendered judgment in favor of the plaintiff, Dieckman, for the balance due on the mortgage debt, and the costs of suit, and for the foreclosure of said mortgage and the sale of the mortgaged premises to satisfy the plaintiff's judgment, interest and costs. Upon the allegations of the cross complaint of said Sarah E. Bodley, which were taken as confessed by said appellants, the court further found that they had acquired their respective titles to the town lots, owned by them respectively, from the defendant and mortgagor, Herman Schrader, after the execution and record of his mortgage to said Sarah E. Bodley, described in her cross complaint; and thereupon the court ordered that the appellants' town lots should be offered and sold to satisfy the plaintiff's said judgment and costs, before any offer or sale should be made of the premises so mortgaged to said Sarah E. Bodley; and to this latter order of the court the appellants, at the time, excepted.

On the record of this cause, the above named appellants have jointly assigned the following errors:

1. The court erred in overruling their demurrer to the cross complaint of said Sarah E. Bodley;
2. The court erred in that portion of its judgment, in this case, to which they excepted; and,
3. The complaint of the plaintiff below, Herman Dieckman, does not state facts sufficient to constitute a cause of action.

The only objection suggested by the appellants' counsel, in argument, to the sufficiency of the plaintiff's complaint is, that, in several instances, the surname only of a defendant was given in the complaint. This objection is one that could not be reached even by a demurrer for the want of

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sufficient facts, and certainly it can not be made available for any purpose, after a finding and judgment below, under an assignment, for the first time, in this court, of the insufficiency of the facts stated in the complaint to constitute a cause of action. The complaint was sufficient, in the particular suggested by counsel, as to all the appellants, for the full names of each of them appear to have been given, and we can not see how they, or either of them, can or could be injured in the slightest degree by the plaintiff's omission to set out in his complaint the christian or given names, as well as the surnames, of any or all of their co-defendants. The objection to the sufficiency of the complaint is not well taken.

The first and second errors, as above assigned, may properly be considered together; for, if the court did not err in overruling the appellants' demurrer to the cross complaint of Sarah E. Bodley, it is certain that no error was committed in that portion of the court's judgment to which the appellants excepted. In her cross complaint, the said Sarah E. Bodley alleged, in substance, that, after the execution of the mortgage in suit, described in the plaintiff's complaint, the mortgagors, Schrader and Boehringer, laid out and platted a part of the mortgaged real estate into town lots and streets, as an addition to the town of Batesville, on July 29th, 1869; that afterward, on August 30th, 1871, the said Schrader and his wife mortgaged to said Sarah E. Bodley all the real estate described in plaintiff's mortgage, which had not been laid out and platted as aforesaid, and, also, lot number 240 in said town plat, to secure the payment of two notes for \$5,000 each, copies of which notes, and of her mortgage, were filed with and made a part of her cross complaint; that her said mortgage was duly recorded in the recorder's office of said county, on the 4th day of September, 1871; that, on February 16th, 1877, in said Ripley Circuit Court, she had duly recovered a judgment against the said

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Schrader and his wife, in the sum of \$11,752.09, and for the foreclosure of her said mortgage; that, on March 31st, 1877, she caused all the said real estate, so mortgaged to her, to be sold at sheriff's sale, under an order of sale issued on her said judgment, and purchased the same for \$8,500, leaving a balance due her on her said judgment of \$4,000; that the said Herman Schrader was still the owner of certain town lots, describing them by their numbers, covered by the plaintiff's mortgage and not covered by her mortgage, in which town lots the appellant Joseph Heman claimed some interest derived from said Schrader after the execution and record of her said mortgage; that, after the execution and record of her said mortgage, the said Schrader and his wife conveyed certain others of the said town lots, describing them by their numbers, to the appellants respectively, giving the dates of their respective deeds; and that the said portions of the real estate covered by the plaintiff's mortgage, still owned by said Schrader, or sold and conveyed by him and his wife to the appellants respectively, after the execution and record of her said mortgage, were worth sufficient to fully satisfy the plaintiff's said mortgage, without selling any part of the said real estate embraced in said mortgage to her, the said Sarah E. Bodley. Wherefore she prayed the court to order and require the plaintiff to first sell the property still belonging to said Herman Schrader, and that which he had conveyed to the appellants after the execution of her said mortgage, before selling any part of the real estate contained in her mortgage, and for general relief.

We are of the opinion that the court committed no error, either in overruling the appellants' demurrer to the cross complaint of said Sarah E. Bodley, or in rendering judgment for the sale of the mortgaged property, in accordance with the prayer of said cross complaint. Upon the facts alleged in her cross complaint, which were not controverted by the appellants and must be taken as true, as the case is

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presented in this court, the said Sarah E. Bodley was clearly entitled, we think, to the equitable relief she asked for, and which the court gave her, in that portion of its judgment excepted to by the appellants. Where suit is brought for the foreclosure of a mortgage on real estate, and such real estate, after the execution and record of such mortgage, or with notice thereof, has been encumbered or conveyed in different parcels, at different dates, and to or in favor of different persons, and the junior encumbrancers or grantees have been made defendants to such suit for foreclosure, the rule is well settled, in this State, that the different parcels of the mortgaged real estate, so encumbered or conveyed by the mortgagors before such foreclosure, will be ordered to be sold in such parcels for the payment of the mortgage debt, in the inverse order of such junior encumbrance or conveyance thereof to the mortgagors. Under the rule, the parcel last encumbered or conveyed by the mortgagors, will be ordered to be sold first by the sheriff, for the payment of the mortgage debt, before any sale is made of the next preceding parcel, and so on, inversely, until the debt and costs are fully satisfied, or until all such parcels have been thus sold. *Day v. Patterson*, 18 Ind. 114; *Williams v. Perry*, 20 Ind. 437; *Aiken v. Bruen*, 21 Ind. 137; *Alsop v. Hutchings*, 25 Ind. 347; *McShirley v. Birt*, 44 Ind. 382; *Houston v. Houston*, 67 Ind. 276.

The rule just stated is the one which fixes and determines the relative rights of the several junior encumbrancers or grantees of different parts or parcels of the mortgaged premises, as between themselves; but this rule is subject, of course, to the primary rule, that, if, at the time of foreclosure, the original mortgagors should still own and hold any part or parcel of the mortgaged property, free from any junior encumbrance thereon, such part or parcel must be ordered to be sold first, for the payment of the mortgage debt and costs, before any sale shall be made of any other part or

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parcel of the mortgaged premises. *Houston v. Houston, supra.*

We find no error in the record.

After the appeal, and before the submission of this cause, it was suggested to this court that the plaintiff below, Herman Dieckman, had departed this life testate, and that John Behrman had been duly appointed and qualified as executor of the last will of said decedent; and, on the appellants' motion, the said Behrman, as such executor, was substituted as the appellee, and, as such, the judgment below is affirmed, in his favor, by this court.

The judgment is affirmed, at the appellants' costs.

No. 6838.

SHERMAN ET AL. v. CARVILL.

EXECUTION.—Proceedings Supplementary.—Nulla Bona.—By sections 518 and 522 of the code, a return of *nulla bona* on an execution against the property of a judgment debtor is sufficient to entitle the judgment plaintiff to prosecute the proceedings supplementary to execution therein provided.

SAME.—Proceeds of Partition Sale.—The net proceeds of a partition sale, belonging to a judgment debtor, in the hands of the commissioner appointed in the action for partition to sell the real estate, may be reached by a judgment creditor in proceedings supplementary to execution.

SAME.—Burden of Proof.—The sale of the real estate for the price charged in the complaint being admitted, the burden was on the defendants to show what disposition had been made of the share of the judgment debtor.

SAME.—Voluntary Assignment of Proceeds.—A voluntary assignment of such proceeds by the debtor is void as against creditors.

From the Harrison Circuit Court.

W. T. Jones, S. J. Wright, H. Jordan and L. Jordan,
for appellants.

B. P. Douglass and S. M. Stockslager, for appellee.

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WOODS, J.—Proceedings supplementary to execution; judgment for the appellee, who was the plaintiff below.

The sole ground on which the appellants predicate their appeal is, that the finding and judgment of the court are not supported by sufficient evidence. The only respect in which it is claimed that the evidence is defective is this, that it was not shown that Sherman, the judgment defendant, had no leviable property, out of which the judgment could have been made, nor that the appellant Jones had money or credits in his hands belonging to said Sherman.

On the first point, it is sufficient to say that it was proven that an execution issued on the judgment had been returned "*nulla bona*," and, by sections 518 and 522 of the code, such return is sufficient to entitle the judgment plaintiff to prosecute the proceedings supplementary to execution therein provided.

In reference to the second point, the fact was admitted in the pleadings, and needed no proof. The complaint showed that, in a certain suit for the partition of real estate, of which said Sherman was the half-owner, subject to certain specified liens, said Jones had been appointed, by the Harrison Circuit Court, a commissioner to sell the property, divide the proceeds, and, after discharging the liens, to pay over to said Sherman the remainder of his share, the one-half, of the sum realized from the sale; that a sale had been made for \$6,000, and there remained in, or would come into, the hands of said commissioner, the sum of one thousand dollars for the use of said Sherman, after paying the said liens. The answers of the appellants, which, like the complaint, were verified, admitted the facts averred by the plaintiff, except that there remained anything in, or to come into, the hands of the commissioner for the use of Sherman. This was not specifically claimed, but it was alleged that, before the commencement of this proceeding, Sherman had made an assignment of his interest in the proceeds of the

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said sale to the appellant Doll, a copy of which assignment was filed with and made a part of the answer. Some attempt was also made by said commissioner, Jones, to show that he had paid out more than had come into his hands, for the use of Sherman, before he was served with notice of this suit. The sale for the price charged in the complaint having been admitted, the burden was on the appellants to show what disposition had been made of the share of Sherman in the proceeds remaining after payment of the liens thereon. The alleged assignment to Doll was, on its face, null and void as against Sherman's creditors, because voluntary and made in trust for the benefit of Sherman's children; and neither by their answers nor by proof did the appellants show that the remainder of the \$3,000 coming to Sherman from the proceeds of said sale, after discharging the liens thereon and paying the costs of the procedure, had been paid out before the commencement of this action, either to Sherman or his said assignee. The answer of Jones showed that \$1,500 of the price for which the sale was made, had not been collected; and, of that sum, upon all the facts as shown, without dispute, in the complaint and answers, it is manifest that an amount would remain of Sherman's share greater than the sum found due the plaintiff on his judgment. The proof also showed that Sherman was not a householder, and was, therefore, not entitled to an exemption.

Judgment affirmed, with costs.

Howk, J., was absent.

No. 6450.

SHAPPENDOCIA *v.* SPENCER ET AL.

PLEADING.—*Practice.*—*Replevin.*—*Lien.*—Where, in an action for the recovery of personal property, the answer averred that "on said ——— day of ———, 1876," the defendant acquired a lien thereon, an objection that

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such answer fails to show when the lien accrued cannot be reached by a demurrer for want of facts, but by a motion to make more specific.

SAME.—*Notice of Sale.*—In such case, neither the notice of the time and place of the sale of the property, under such lien, nor a copy thereof, is a necessary part of the answer.

LIVERYMAN'S LIEN.—*Requisites of Notice of Sale Under.*—Notice of the time and place of the sale of property by a liveryman, to satisfy his lien thereon, if the value thereof is ten dollars or more, is sufficient if given by publishing the same three weeks successively in a newspaper in the county.

SAME.—Notice that a sale will be made "on the — day of —, 1877," is not a notice of the time and place of sale.

SAME.—*Invalid Sale.*—Where, in such action, the answer shows that the defendant has a valid lien under the statute on the property sold, it is sufficient without regard to the validity of the sale.

From the Grant Circuit Court.

J. F. McDowell, G. L. McDowell, A. Steele and R. T. St. John, for appellant.

I. Van Devanter and J. W. Lacey, for appellees.

HOWK, J.—This was a suit by the appellant, against the appellees, to recover the possession of one bay mare, aged about 8 years, of the value of \$150, of which mare the appellant alleged, in his complaint, that he was the owner and entitled to the possession, and that the appellees had possession thereof without right and unlawfully detained the same from him; wherefore he demanded judgment for the recovery of said mare, and damages for the detention thereof.

To the appellant's complaint the appellees answered specially in a single paragraph, to which the appellant demurred for the alleged insufficiency of the facts therein to constitute a defence to his action, which demurrer was overruled by the court, and to this ruling he excepted. The cause was put at issue and tried by the court, and a finding was made that the appellees were the owners of the mare in controversy, of the value of \$125, and that the said mare should be returned to them. The appellant's motion for a new trial having been overruled, and his exception duly saved

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to this decision, the court rendered judgment for the appellees upon and in accordance with its finding.

In this court the appellant has assigned as errors the following decisions of the circuit court :

1. In overruling his demurrer to the appellees' answer ; and,
2. In overruling his motion for a new trial.

The principal questions presented for the decision of this court, in this case, arise under the alleged error of the trial court in overruling the appellant's demurrer for the want of facts, to the appellees' answer. In their answer the appellees alleged, in substance, that on the — day of —, 1876, and for — months prior thereto, they were doing business as livery-stable men in the town of Marion, in Grant county, Indiana, under the firm name and style of Spencer & Barnard ; that on said — day of —, 1876, the appellees had acquired a lien upon the said mare, in appellant's complaint mentioned, for feed and care bestowed by them, as said livery-stable men, on and about said mare, in said Grant county, at the appellant's request, in the sum of \$158.20 ; that, for the purpose of enforcing their said lien, on the — day of —, 1876, and for three successive weeks subsequent thereto, the appellees caused to be published in the Marion Chronicle, a newspaper of general circulation published in said county, a notice that they would cause said mare to be sold at public sale to the highest bidder, on the — day of —, 1877, at the stables of the said Spencer & Barnard, in the town of Marion, in said county ; that on said — day of —, 1877, and in all respects pursuant to said notice, the appellees caused said mare to be offered at public sale ; that at said sale the appellees, among others, became bidders, bidding for said mare the sum of —, which being the highest and best bid that could be obtained, the said mare was sold to the appellees for the said sum of \$105, and thereby became and still was the property of the appellees. Wherefore they de-

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manded judgment for the return of the property, and for seventy-five dollars damages for the detention thereof, and for other proper relief.

In discussing the sufficiency of the answer, in their brief of this cause, the appellant's counsel say: "Our first objection to this answer is, that it does not contain any showing of the time when the lien accrued." We suppose that counsel intended to object to the answer, on account of the blanks therein as to the month and day, on which the lien accrued. On this point the allegation in the answer is, "that on said — day of —, 1876, defendants had acquired a lien upon said mare," etc. This style of pleading is, we think, a proper subject of criticism. But the appellant's first objection to the answer is one that could not be reached by his demurrer thereto, for the want of facts. The answer showed, that the lien accrued in or during the year 1876; and if the appellant deemed it necessary that the answer should further show the month and day in that year, his only remedy, if any, was a motion for an order requiring the appellees to make their answer more specific in those particulars. *Hyatt v. Mattingly*, 68 Ind. 271.

The appellant's counsel also object to the sufficiency of the answer upon the ground that the notice or advertisement of the time and place of the sale of the mare, mentioned in the answer, was not made a part thereof. The notice or advertisement was not, in any proper sense, the foundation of the appellees' defence, and it was not necessary that the notice, or a copy thereof, should be made a part of their answer. They averred therein, with sufficient certainty, what the notice contained, and that was all that it was necessary to aver in that regard. But it is claimed that the answer was bad because it did not show that copies of the notice or advertisement had been set up for ten days, in three public places in the township where the appellees resided, one of which was in some conspicuous part of their

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place of business. The act of January 27th, 1853, giving the keepers of livery-stables, etc., engaged in feeding horses, etc., a lien upon such property, for the feed and care bestowed by them upon the same, provides that they shall have the same rights and remedies, as were provided in "An act concerning liens of mechanics, merchants and others," approved May 20th, 1852. On the subject of the sale of the property by the party who had acquired a lien thereon, it was provided in section 2 of the said act of May 20th, 1852, that, before such sale, such party should give public notice of the time and place thereof, by advertisements set up for ten days in three public places, in the city or township where he resided, one of which should be in some conspicuous part of his shop, or place of business; "or if the value of the article be ten dollars or more, then by publishing the same three weeks successively in a newspaper in the county, if any." 2 R. S. 1876, p. 335, sec. 2.

It seems to us that under this section, where, as in this case, the value of the property is ten dollars or more, the notice of the time and place of the sale thereof must be given "by publishing the same three weeks successively in a newspaper in the county, if any," and need not be given otherwise. If, however, the sufficiency of the appellees' answer had been dependent upon the validity of the notice, as stated in the answer, we would have been constrained to hold the answer bad, on the demurrer thereto for the want of facts; for a legal notice that a sale will be made "on the — day of —, 1877," is simply no notice at all of the time and place of sale. But the answer stated facts to show that the appellees had acquired a valid lien under the statute on the appellant's mare, and this was a sufficient defence to the action, without regard to the validity of the sale.

The answer is indefinite and uncertain in its allegations of fact; but, as we have already said, these objections to the answer could only be reached by a motion to make it more

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specific, and not by a demurrer for the want of facts. *Holcraft v. Mellott*, 57 Ind. 539. We are of the opinion that the court did not err in overruling the demurrer to the answer.

The evidence is not in the record, and no question is presented for the decision of this court, by the alleged error of the circuit court, in overruling the motion for a new trial. Besides, as this supposed error is not even alluded to in the brief of the appellant's counsel, it must be regarded as waived.

The judgment is affirmed, at the appellant's costs.

No. 7330.

SHAPPENDOCIA ET AL. v. SPENCER ET AL.

PLEADING.—*Replevin Bond.*—*Complaint.*—*Principal and Surety.*—In a complaint on a replevin bond for a breach thereof in failing to return the property after a judgment therefor, it is not necessary to aver who were sureties and who principals in the bond, or to file copies of the writ of replevin and the return of the officer thereon, with such complaint.

From the Grant Circuit Court.

J. F. McDowell, G. L. McDowell, A. Steele and R. T. St. John, for appellants.

I. Van Devanter and J. W. Lacey, for appellees.

WOODS, J.—The appellees sued the appellants upon a replevin bond, and obtained a judgment. The appellants saved exceptions to the overruling of their motion for a new trial and their motion in arrest of judgment.

The evidence is not in the record, and we therefore can not say that the verdict is contrary to law, nor that it is not supported by sufficient evidence. The motion in arrest was properly overruled.

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The substance of the complaint is, that the defendant Shappendocia had sued the plaintiffs in the Grant Circuit Court for the unlawful detention of a bay mare, and on the writ issued in that suit the sheriff, on the 14th day of May, 1877, had taken and delivered the property to said defendant, who, together with his co-defendants, in order to obtain said delivery, executed, to the approval of the sheriff, the bond sued on, a copy of which is filed with and made a part of the complaint; that, in said suit, the appellees obtained a judgment for their costs, and for the return of said property, the value thereof being found to be two hundred dollars; that they had caused a writ for the return of said property to be duly issued to the sheriff of said county, on which the sheriff had made return that said property was not found in his bailiwick, and that no other property of said Shappendocia had been found on which to levy; that, though often requested, said defendant has failed and refused to return said property, and, also, to pay to the plaintiffs the costs so recovered by the plaintiffs against him. Wherefore, etc.

Copy of bond filed with complaint :

“STATE OF INDIANA, GRANT CO., ss. Grant Circuit Court, September Term, 1877.	} Geo. D. Shappendocia vs. Otto B. Spencer and Jacob Barnard.
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“We undertake that the plaintiff, George D. Shappendocia, shall prosecute this action with effect and without delay, and return the property in controversy to the defendants if a return be adjudged by the court, and pay to them all such sums of money as they may recover against ——— in this action for any cause whatever.

“May 14th, 1877.

his
“GEORGE D. X SHAPPENDOCIA,
mark.

“WM. PECONGA,

“GEO. N. WINCHELL.

“Attest : R. T. ST. JOHN.”

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This complaint, it is claimed, is defective because it does not show who were sureties and who principals in the bond; that copies of the writ of replevin and the sheriff's return thereon are not set out; that there is no sufficient averment of a breach of the conditions of the bond, or of a forfeiture thereof; that all the defendants are treated as principals; and that it is not averred that neither of the appellants had returned the mare, nor that there had been a return of no property as to them.

While counsel for the appellants have taken the trouble to state these objections against the complaint, they have ventured upon no argument in their support. There is nothing in them. The appellees not having asked for any damages, we award none.

The judgment affirmed, with costs.

No. 7767.

WAGNER v. WAGNER.

PRACTICE.—*Assignment of Error.*—*Supreme Court.*—*Complaint.*—Under section 54 of the code, the sufficiency of the complaint, as an entirety, may be called in question for the first time in the Supreme Court by a proper assignment of error; but an assignment that either or any paragraph of complaint does not state facts sufficient to constitute a cause of action is insufficient.

From the Ripley Circuit Court.

G. Durbin, for appellant.

A. Stockinger, for appellee.

Howk, J.—In this action the appellee sued the appellant in a complaint of seven paragraphs, each of which paragraphs counted upon a promissory note, executed by the ap-

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pellant to the appellee, all of which notes bore the same date and were past due. The appellee alleged, in substance, in each paragraph of his complaint, that the note sued on therein was given to him by the appellant for a part of the purchase-money of lot number seventy-nine, in the town of Osgood, in Ripley county, and that it was due and unpaid; and, in each paragraph, he demanded judgment for a certain sum of money, and "that the same be declared a lien on said lot."

The cause, having been put at issue, was tried by the court, and a finding was made for the appellee for the full amount due on the notes in suit; and judgment was rendered accordingly.

In this court, the appellant has assigned the following supposed errors:

1. That neither paragraph of the appellee's complaint stated facts sufficient to constitute a cause of action; and,
2. That the court erred in sustaining appellee's demurrer to the third paragraph of the appellant's answer.

The first of these two errors is not well assigned. Each paragraph of the complaint stated facts sufficient to constitute a good cause of action. But the assignment of error is not authorized by the code, and does not present, for decision, the sufficiency of either paragraph of the complaint. In section 54 of the code it is provided, in substance, that the defendant shall not be deemed to have waived "the objection that the complaint does not state facts sufficient to constitute a cause of action," by his failure to demur to the complaint on that ground; and, under that section, the sufficiency of the complaint, as an entirety, may be called in question for the first time, in this court, by a proper assignment of error. This is an exception, however, to the general doctrine of waiver declared in said section 54, and it has never been extended, by construction, beyond the strict letter of the statute. It can not be assigned as error, there-

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fore, that either or any paragraph of the complaint does not state facts sufficient to constitute a cause of action, but the assignment of error must conform to the exact language of the statute. *Caress v. Foster*, 62 Ind. 145; *Smith v. Freeman*, 71 Ind. 85; *The Pittsburgh, etc., R. W. Co. v. Hunt*, 71 Ind. 229.

2. In his brief of this cause in this court, the appellant's counsel says of the third paragraph of answer: "An insufficient answer is a sufficient answer to an insufficient complaint." This is the entire argument of counsel, under the second alleged error, and it seems to us to amount to a virtual admission by the appellant, that the third paragraph of his answer was not sufficient. We are of the opinion that this third paragraph was clearly insufficient, and that the appellee's complaint was sufficient. The argument of counsel, above quoted, is not applicable, therefore, to the case made by the record.

The judgment is affirmed, at the appellant's costs.

No. 8899.

KETCHUM v. SCHICKETANZ.

DESCENT.—*Wife's Interest in Real Estate of Husband.*—Under section 27 of the act regulating descents, 1 R. S. 1876, p. 413, a surviving wife is entitled to one-third of all lands in which her husband had an equitable interest at the time of his death.

JUDICIAL SALE OF REAL ESTATE.—*Inchoate Interest of Wife.*—By the act of March 11th, 1875, 1 R. S. 1876, p. 554, the inchoate interest of a wife in the lands of her husband vests absolutely in her when such lands are sold and conveyed away from him under a judicial proceeding, in the same manner and to the same extent as such interest would vest in her upon the death of her husband.

SAME.—*Bankruptcy.*—*Conveyance to Assignee.*—*Inchoate Interest of Wife in*

73	1
127	4
73	1
129	2
73	1
138	4
138	6
73	1
140	1

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Bankrupt's Real Estate.—A conveyance by a register in bankruptcy of the real estate of an adjudged bankrupt to his assignee is a judicial sale within the meaning of said act of 1875, and vests the inchoate interest of the bankrupt's wife in such real estate, in the same manner and to the same extent as upon a judicial sale made in pursuance of the laws of this State.

SAME.—Sheriff's Certificate.—Fraudulent Assignment.—Conveyance.—Commissioner.—Where, in proceedings in bankruptcy, an assignment by the bankrupt of a sheriff's certificate of purchase of real estate, after the time for its redemption had expired, under which the assignee thereof had obtained a deed, is adjudged fraudulent and set aside, and the real estate included therein conveyed to the assignee of the bankrupt by a commissioner, in pursuance of an order of court, such conveyance is a judicial sale within the meaning of said act of March 11th, 1875, and placed such real estate in the hands of such assignee, in the same condition with reference to the claim of the wife of such bankrupt therein, as if it had been conveyed to such assignee by the judge or register in bankruptcy in the usual way after the adjudication in bankruptcy.

SAME.—Partition.—Estoppel.—In an action for partition of such real estate against the purchaser thereof at the bankrupt sale, such purchaser is estopped from asserting that the bankrupt had no title to the real estate at the time he was adjudged a bankrupt.

From the Marion Superior Court.

D. V. Burns, C. A. Denny, V. Carter and S. Claypool, for appellant.

H. W. Harrington and A. G. Howe, for appellee.

NIBLACK, C. J.—This was an action for partition brought by Maria Schicketanz, the appellee, against John L. Ketchum, the appellant.

The complaint alleged that prior to the 21st day of June, 1878, one Jacob Schicketanz, the husband of the plaintiff, had become the owner by purchase at sheriff's sale, and the expiration of the time for their redemption, of a considerable number of lots in one of the additions to the city of Indianapolis, and that within thirty days before that day the said Jacob Schicketanz assigned and transferred his certificate of purchase of said lots, without consideration, and for the purpose of defrauding his creditors, to his son, George Schicketanz, who received a sheriff's deed for such lots, that

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on said 21st day of June, 1878, the said Jacob Schicketanz filed his petition in bankruptcy, and was, on the 25th day of the same month, adjudged a bankrupt by the proper court; that afterward, by proper judicial proceedings, the assignment and transfer of said lots to the said George Schicketanz was adjudged to be fraudulent and void, and said lots were, by order of court, conveyed to the assignee in bankruptcy of the said Jacob Schicketanz, who thereupon, as such assignee, sold and conveyed said lots to Ketchum, the defendant, of whom partition had been demanded.

The defendant answered, admitting that he was the owner of the lots of which partition was desired, and that he had purchased the lots of the said Jacob Schicketanz's assignee in bankruptcy, at the time and place and in the manner alleged in the complaint, but averring that he paid for the same the sum of five hundred dollars, and that at the time of his purchase he had no knowledge that the plaintiff had, or claimed to have, any interest in said lots, or that there was such a person as the plaintiff in existence, or that the said Jacob Schicketanz was a married man, and denying all the allegations of the complaint not specifically admitted.

On motion of the plaintiff, and over the objection and exception of the defendant, the court struck out so much of the answer as referred to the price paid by the defendant for the lots, and as averred the defendant's want of knowledge of the plaintiff's supposed interest in the lots, or of her existence, or of her marital relations with the said Jacob Schicketanz. The cause was then submitted to the court at special term for trial upon substantially the following agreed statement of facts:

It was admitted that the plaintiff was then, and had been continuously for ten years then last past, the wife of the said Jacob Schicketanz; that the said Jacob did, on the 21st day of June, 1878, file his voluntary petition in bankruptcy in the District Court of the United States for the District of

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Indiana, and that said court, sitting as a court of bankruptcy, did, on the 25th day of June, 1878, duly adjudge him a bankrupt, and appoint one Jeremiah McLene as assignee of his estate in bankruptcy, the said McLene duly qualifying as such assignee; that Henry Jordan, register in bankruptcy, on the 19th day of July, 1878, properly and legally assigned to the said McLene, as such assignee, all the estate, both real and personal, of the said Jacob, and all the right, title, interest or claim which he, said register, had in the estate of the said bankrupt, vested in him by virtue of the bankrupt act of March 2d, 1867; that prior to the filing of his petition in bankruptcy, that is to say, on the 26th day of May, 1877, the said Jacob purchased the lots in controversy, together with some other property, at sheriff's sale, for the sum of ten thousand two hundred and eighty-seven dollars, which sum was duly paid to the sheriff, such sale being made upon a decree of foreclosure of a mortgage, and received a certificate of purchase from the sheriff for said lots and other property; that the said Jacob was indebted to the "Citizens National Bank" of Indianapolis, and, on the 31st day of October, 1877, he assigned the said sheriff's certificate to said bank by way of security for such indebtedness; that the said Jacob repaid to said bank the greater portion of said indebtedness, but a small portion of it was paid by his son George Schicketanz; that, upon such payment being made in full, said bank surrendered said certificate, and, on the 11th day of June, 1878, and within twelve days before filing his petition in bankruptcy, the said Jacob, for the purpose of defrauding his creditors, and in fraud of the bankrupt act aforesaid, assigned said certificate to his said son George Schicketanz, who presented such certificate to the sheriff of Marion county, and by virtue thereof received a deed from such sheriff for the real estate in controversy; that there was no redemption of said real estate from the sheriff's sale, and the time for its redemption had expired

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before the said Jacob assigned the said certificate to his said son George ; that the assignment of said certificate was made to the said George Schicketanz without consideration, and without the consent of the plaintiff, who did not join therein : that, after the said McLene was appointed assignee in bankruptcy of the estate of the said Jacob, he filed a bill in chancery in said District Court of the United States, making the said Jacob and his said son George, and his, the said George's, wife, parties thereto, and alleging that the assignment of said sheriff's certificate by the said Jacob to his said son George was without consideration, and for the purpose of defrauding the creditors of the said Jacob, and in fraud of the bankrupt act above referred to, and that the real estate in dispute was necessary to pay the debts of said Jacob ; that the defendants to said bill in chancery were all duly served with the process of said court, but did not appear to the action, and made default therein ; that said court thereupon adjudged that the assignment of said sheriff's certificate of purchase to the said George Schicketanz was made to defraud the creditors of the said Jacob, and was in fraud of the bankrupt law under which he had been adjudicated a bankrupt, and was fraudulent as against the said McLene as the assignee of the said Jacob, and that said real estate was a part of the estate of the said Jacob in bankruptcy, and in the hands of said assignee, and decreed that the said George Schicketanz and wife should, within ten days thereafter, convey said real estate to the said McLene, assignee as aforesaid, to be sold as a part of the said Jacob's estate in bankruptcy ; and, in default so to do within said time, then that William P. Fishback was thereby appointed master commissioner to make said conveyance ; that the said George Schicketanz and wife failing to make such conveyance, the said Fishback, as such master commissioner, did, on the 28th day of February, 1879, in accordance with said decree, convey said real estate to the said McLene as such assignee ;

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that, on the 5th day of April, 1879, in pursuance of an order of said United States District Court, said real estate was sold by McLene, the assignee, at a bankrupt sale, the defendant herein becoming the purchaser thereof, without notice of the plaintiff's claim, except such as he acquired through said bankrupt proceedings and said proceedings in chancery to set aside the assignment of said sheriff's certificate to the said George Schicketanz; that said sale to the defendant was confirmed by the court, and the said McLene, as assignee, made the proper conveyance of the real estate so sold to the defendant; that the plaintiff was not a party to the bill in chancery filed to set aside the assignment of the sheriff's certificate; that said real estate was worth less than ten thousand dollars.

Upon the facts thus agreed upon, the court found that the plaintiff was the owner in fee simple of one-third part of the real estate described in the complaint, and that she was entitled to have partition thereof. Partition was thereupon decreed and made accordingly. The defendant then appealed to the general term, where the judgment at special term was affirmed. The defendant has further appealed to this court, where he contends that the finding at special term, upon the agreed statement of facts, above set out, ought to have been in his favor.

Under section 27 of the act regulating descents and the apportionment of estates, a surviving wife is entitled to one-third of all lands in which her husband had an equitable interest at the time of his death. 1 R. S. 1876, p. 413.

By the act of March 11th, 1875, the inchoate interest of a wife, in the lands of her husband, vests absolutely in her when such lands are sold and conveyed away from him under some judicial proceeding, in the same manner, and to the same extent, as such inchoate interest would vest in her upon the death of the husband. Acts 1875, Reg. Sess., 178.

When, therefore, the equitable interest of a husband in a

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tract of land is sold and conveyed away, under a judicial proceeding, his wife becomes immediately and absolutely entitled to one-third of such land as against the purchaser, provided the value of the land does not exceed ten thousand dollars.

In the case of *Roberts v. Shroyer*, 68 Ind. 64, it was, upon full consideration, held that a conveyance, by the proper judge or register in bankruptcy, of the real estate of an adjudged bankrupt, to his assignee, is a judicial sale within the meaning of the act of March 11th, 1875, *supra*, and that the inchoate interest of the bankrupt's wife in such real estate thereupon becomes absolute in the same manner, and to the same extent, as upon a judicial sale made under the authority of some court of this State. See, also, *Jackman v. Nowling*, 69 Ind. 188.

The facts agreed upon in this case show that, in legal contemplation, the lots described in the complaint constituted a portion of Jacob Schicketanz's estate when he was adjudged a bankrupt, and that the conveyance of those lots by the sheriff to George Schicketanz inured to the benefit of the estate, which passed to the assignee, McLene, by the bankruptcy of the said Jacob.

Under the circumstances attending it, we think the conveyance by Fishback, the master commissioner, to McLene, the assignee, was a judicial sale within the spirit, purview and meaning of the act of March 11th, 1875, and placed the lots conveyed by it in the hands of the assignee, in the same condition with reference to the claim of an interest in them by the plaintiff, as they would have occupied if they had been conveyed to such assignee either by the Judge of the United States District Court, or the register in bankruptcy, in the usual way, after the adjudication in bankruptcy.

The only title which the defendant asserts to the lots came to him from the bankrupt, through the proceedings in bankruptcy, and he ought not to be heard to say, for the

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purpose of defeating the plaintiff's claim, that the bankrupt had no title to those lots when he was adjudged a bankrupt.

We see no error in the proceedings below.

The judgment at general term is affirmed, with costs.

Petition for a rehearing overruled.

73 144
124 190

No. 6518.

ENTSMINGER ET AL. v. JACKSON ET AL.

PLEADING.—Description of Personalty.—In an action for the recovery of personal property, the complaint must describe the property claimed, and a description thereof in one paragraph can not be supplied by reference to another paragraph.

SAME.—Each Paragraph Must be Complete.—Each paragraph of a pleading must be complete within itself, and can not be aided or supplied by reference to the allegations of another paragraph.

SAME.—Replevin.—Ownership.—Possession.—An action for the recovery of personal property is a possessory action, and a mere possessory right may prevail against an absolute legal title where such title and the right to the possession become separated and are held by different parties.

SAME.—Complaint.—Demurrer.—A complaint in such action, alleging merely that the plaintiff is the owner of certain personal property, and not that he is entitled to the possession thereof, and containing no allegation that such property has been either wrongfully taken or unlawfully detained, is insufficient on demurrer.

From the Grant Circuit Court.

J. F. McDowell, G. L. McDowell, I. Van Devanter and J. W. Lacey, for appellants.

A. E. Steele and J. H. Baldwin, for appellees.

Howk, J.—This was a suit by the appellees against the appellants, to recover the possession of three thousand feet of walnut lumber, alleged, *inter alia*, to be of the value of \$135.00. On the trial of the cause, the appellees recovered

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judgment, from which judgment this appeal is prosecuted by the defendants below.

In this court the only error assigned by the appellants is the decision of the circuit court, in overruling their demurrer, for the want of sufficient facts, to the second paragraph of the appellees' complaint.

In said second paragraph of complaint, the appellees alleged, in substance, that they were "the owners of the property mentioned in the first paragraph of this complaint by purchase from one Johnson Nelson, and that the same was levied upon by the defendants, by virtue of an execution in the hands of the said sheriff in favor of the defendant Entsminger, and against the property of the said Johnson Nelson and one Henderson Nelson, and that said property was purchased by the plaintiffs before levy was made, and that, at the time they so purchased said property of said Nelson, he, the said Nelson, was not the owner of three hundred dollars' worth of property, as is evidenced by this schedule, which is filed herewith and made a part of this complaint, and he, by said schedule, hereby demands, as exempt from execution, the articles therein set forth, and said articles be appraised according to law; and that he is a resident householder of the State of Indiana, and that no demand had been made against or of either of them, for property upon which to levy said execution, and that said purchase was made in good faith and for a valuable consideration. Wherefore plaintiffs demand judgment for the possession of said property and costs, and all other proper relief."

We are of the opinion, that the facts alleged in this second paragraph of complaint were not sufficient to constitute a cause of action against the appellants, one of whom was sued as the sheriff of Grant county. The paragraph was clearly bad, because it contained no description whatever of the property, for the recovery of the possession of which the

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action was brought. The only description given is, "the property mentioned in the first paragraph of this complaint." Under the code, the rule is almost elementary which requires that each paragraph of complaint must state a cause of action, perfect and complete within and of itself, for the defective allegations of one paragraph can not be aided or supplied by reference to the allegations of another paragraph. *McCarnan v. Cochran*, 57 Ind. 166; *Smith v. Little*, 67 Ind. 549; *Field v. Burton*, 71 Ind. 380. Besides, an action for the recovery of personal property is undoubtedly a possessory action, wherein a mere possessory right may, and often will, prevail against an absolute legal title, where the absolute title to personal property, and the right to the possession thereof, become separated and are held by different parties. *Kramer v. Matthews*, 68 Ind. 172, on page 176. For this reason a complaint in such an action, alleging merely that the plaintiff is the owner of certain personal property, and not that he is entitled to the possession thereof, and containing no allegation that the same either has been wrongfully taken, or is unlawfully detained, by the defendant, must be held bad, we think, on a demurrer thereto for the want of sufficient facts.

In the case at bar, the appellees failed to allege, in the second paragraph of their complaint, as will be seen from our summary thereof, either that they were entitled to the possession of the personal property sued for, or that such property had been wrongfully taken, or was unlawfully detained, by the appellants, or either of them. These allegations of facts were essential to the appellees' cause of action against the appellants, and their omission from the second paragraph of the complaint was fatal, on the demurrer thereto, to its sufficiency and validity. *Baer v. Martin*, 2 Ind. 229; *Ridenour v. Beekman*, 68 Ind. 236; *Krug v. Herod*, 69 Ind. 78.

Other objections have been suggested by the appellants'

The State v. Quick.

counsel to the sufficiency of the second paragraph of the complaint, but they seem to us to be the proper subjects of motions to make more specific, rather than of a demurrer for the want of facts. We need not and do not consider them, as we are of the opinion, for the reasons given, that the court erred in overruling the demurrer to said paragraph of complaint.

The judgment is reversed, at the appellees' costs, and the cause is remanded, with instructions to sustain the demurrer to the second paragraph of the complaint, and for further proceedings not inconsistent with this opinion.

9190.

THE STATE v. QUICK.

CRIMINAL LAW.—*Appeal by State.*—*Notice.*—Under section 152, 2 R. S. 1876. p. 411, notice of an appeal by the State in a criminal proceeding, served on the defendant in a county other than that wherein the trial occurred, is insufficient.

From the Elkhart Circuit court.

D. P. Baldwin, Attorney General, *J. S. Drake*, *J. H. Baker*, *J. A. S. Mitchell* and *W. W. Thornton*, for the State.

J. S. Frazer, *W. D. Frazer*, *W. S. Marshall*, *L. H. Haymond* and *L. M. Royse*, for appellee.

ELLIOTT, J.—The appellee was prosecuted and acquitted upon an indictment charging him with a felony. The trial was had in the county of Elkhart. The State appeals, and the appellee has filed a motion to dismiss the appeal.

The State v. Quick.

The appellee insists that the appeal should be dismissed because the notice provided for by statute was not given. Notice was served upon the clerk, and also upon the appellee, in Kosciusko county, by the sheriff of that county. The point made by the appellee is, that the notice served upon a defendant in a criminal prosecution, in any other county than that in which the case was tried, is insufficient, and that the proper method, where the defendant can not be found in such county, is to post up a notice for three weeks in the clerk's office. The statute provides that appeals may be taken by the State, and requires that notice shall be served upon the clerk, and, also, "upon the defendant, if he can be found in the county; if not, then by posting up a notice three weeks in the clerk's office." 2 R. S. 1876, p. 411, sec. 152. It is settled that the appeal must be taken in the manner prescribed by statute, and that the notice constitutes the appeal. *McLaughlin v. The State*, 66 Ind. 193; *Buell v. The State*, 69 Ind. 125; *Winsett v. The State*, 54 Ind. 437. The statute does not make provision for serving notice upon the defendant outside of the county in which the case was tried, but, upon the contrary, makes an express provision for such a case, by requiring that three weeks' notice shall be posted up in the office of the clerk. The law is plain, and the notice served upon the appellee in Kosciusko county was wholly unauthorized. The State had no right to disregard the provision of the statute and substitute a different method of giving notice for that expressly prescribed.

We can not assent to the doctrine asserted by the appellant that it is sufficient to show that the appellant had direct notice of the appeal served upon him, although served in a different county from that in which the case was tried. In such a case as the present, there can be but one sufficient

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method of giving notice of an appeal by the State, and that is the one expressly prescribed by statute.

Appeal dismissed.

WOODS, J., was absent.

No. 7504.

McCracken v. Kuhn et al.

JUDICIAL SALE.—*Conveyance to Assignee of Real Estate of Bankrupt.*—

Wife's Interest.—The conveyance of an adjudged bankrupt's real estate by the register to the assignee in bankruptcy is a "judicial sale," within the meaning of the act of March 11th. 1875, 1 R. S. 1876, p. 554, and the inchoate interest of the wife of the bankrupt becomes vested as soon as such conveyance is made.

SAME.—*Partition by Wife.*—*Demand.*—Under such act the wife may maintain an action for partition without first making a demand therefor of the purchaser of the lands at a judicial sale.

From the Knox Circuit Court.

J. C. Denny and *H. Burns*, for appellant.

W. H. De Wolf and *S. N. Chambers*, for appellees.

NIBLACK, C. J.—This was an action for partition. At the request of the plaintiff, the court which tried the cause made a special finding of the facts established by the evidence, which may be briefly stated as follows:

That, on the 13th day of May, 1876, one Robert McCracken was the owner in fee-simple, and in possession, of the land described in the complaint; that at that time Ella McCracken, the plaintiff, was the wife of the said Robert, and has ever since continued so to be; that, on said 13th day of May, 1876, the said Robert filed his voluntary petition in bankruptcy in the District Court of the United States for

73	149
138	480
138	634
73	149
148	674

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the District of Indiana, and was on that day, upon such petition, adjudged by said district court to be a bankrupt; that, on the 16th day of December, 1876, John W. Ray, as register in bankruptcy, in pursuance of the bankrupt act, executed to William H. H. Beeson, the assignee in bankruptcy of the said Robert, a deed of conveyance, conveying to the said Beeson, as such assignee, all the interest and estate of the said Robert in and to the land of which partition was demanded; that afterward, on the 4th day of September, 1877, Bernhard Kuhn and Hiram A. Foulks, the defendants, having in the meantime become the purchasers thereof, said land, by order of said district court, sitting in bankruptcy, was conveyed by the said Beeson, as such assignee, to said Kuhn and Foulks; that the plaintiff made no proof of any demand upon the defendants for partition of the land in controversy before the commencement of this action. Upon the facts thus found the court came to conclusions of law as follows:

First. That the sale and conveyance of the land in suit by Beeson, as such assignee, to the defendants, as above stated, was not a judicial sale within the meaning of the act of March 11th, 1875, concerning certain inchoate interests of married women.

Second. That the provisions of that act apply only to sales made under some judgment or decree rendered under the authority of the laws of this State.

Third. That before an action for partition can be maintained by a married woman, under the act of March 11th, 1875, *supra*, a demand must have been made by her upon the owner or owners of her husband's late interest in the land which had been sold at a judicial sale.

The court, therefore, held that, upon the facts as found by it, the plaintiff was not entitled to have partition of the land in dispute, and, over her exceptions to the several conclu-

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sions of law set out as above, rendered judgment for the defendants.

According to the doctrine of the very carefully considered case of *Roberts v. Shroyer*, 68 Ind. 64, which has been decided since this cause was tried, the conveyance from Ray, as register, to Beeson, as assignee, in bankruptcy, was a judicial sale within the meaning of the act of March 11th, 1875, and the inchoate interest of Mrs. McCracken became a vested interest as soon as that conveyance was made.

The question as to whether a demand for partition was necessary before the commencement of this suit is one, perhaps, not entirely free from difficulty, but we have reached the conclusion that such a demand was not necessary.

The 1st section of the act of March 11th, 1875, provides, "That when such inchoate right shall become vested, under the provisions of this act, such wife shall have the right to the immediate possession thereof, and may have partition, upon agreement with the purchaser, his heirs or assigns, or upon demand, without the payment of rent, have the same set off to her." Acts 1875, Reg. Sess., p. 178.

The proper construction of this provision appears to us to be, that when the wife shall be unable to obtain partition by agreement with the owner of the lands in which her inchoate interest has become so vested, she may demand to have her interest set off to her by the institution of compulsory proceedings for that purpose, thus recognizing her right to immediate partition as well as to immediate possession.

No previous demand has ever been held to be necessary for the maintenance of an ordinary action for partition, and we are unable to see any reason for believing that the Legislature intended to establish a different rule in cases like this.

The general law for the partition of lands, 2 R. S. 1876, p. 343, sections 9 and 18, refers, in an incidental way, to a demand for partition, as the equivalent of an action for partition, and it is in that sense, we think, the word "demand"

Kelly v. Northington et al.

is used in the provision of the act of March 11th, 1875, above quoted. We are, therefore, of the opinion that the court below erred in its conclusion that the plaintiff was not entitled to have partition upon the facts as found by it.

The judgment is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

No. 6910.

KELLY v. NORTHINGTON ET AL.

EVIDENCE.—Expert.—The testimony of an expert as to the relative value of the labor necessary to produce a crop, to that which is required to prepare it for shipment and market it, in an action by plaintiff for one-half of the proceeds of such crop raised by him on defendant's lands, is immaterial, and no error is committed in excluding it.

SAME.—Weight of Evidence.—The Supreme Court will not disturb a finding where there was evidence, though conflicting, tending to sustain it as to all the points in issue.

From the Warrick Circuit Court.

I. S. Moore, D. V. Burns and C. S. Denny, for appellant.

NIBLACK, C. J.—This was a suit by James Northington and Jesse W. Northington, against John B. Kelly, for one-half of the proceeds of a crop of tobacco, raised by the plaintiffs on the defendant's land, and was commenced before a justice of the peace.

The defendant, by way of counter-claim, set up a demand for damages, arising out of the contract under which the tobacco was raised, and for labor performed in the cultivation of the tobacco. Upon an appeal to the circuit court, and a trial by the court, there was a finding and judgment for the plaintiffs.

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Questions are made here upon the exclusion of certain evidence offered at the trial, and upon the sufficiency of the evidence to sustain the finding of the court.

At the trial, the appellant called Ebenezer Hart, as an expert, to testify as to the relative value of the labor necessary to produce a crop of tobacco, to that which is required to prepare the tobacco for shipment, and for its shipment to market, but the court refused to permit the witness to testify as to such relative value, and the appellant complains of that refusal.

In what respect, however, the proposed evidence was material to the matters really in controversy between the parties has not been pointed out, and an examination of the record has failed to impress us with its materiality. We are, therefore, unable to see that the appellant was injured by its exclusion.

The evidence was quite conflicting in many respects, and it cannot be said that the finding of the court was strongly supported by the evidence; but, as to all the points at issue between the parties, there was evidence tending to sustain the finding, and beyond the ascertainment of that fact we are not required to consider the sufficiency of the evidence.

The judgment is affirmed, with costs.

No. 7759.

NEWMAN v. PERRILL.

CONTRACT.—*Breach.*—*Damages.*—*Pleading.*—*Penalty.*—*Real Estate.*—*Description.*—*Conveyance.*—P. executed a written contract to N., wherein he agreed to convey to him certain described land in Hardin county, Ill., if not then disposed of by parties with whom it was left for disposition; and if so, in lieu thereof, to convey to N. "one hundred and

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sixty acres of land in any one of the following counties in the State of Missouri, viz.: * * * Now, should the said P. fail to comply with the above contract, he forfeits the sum of one thousand dollars to the said N." Suit by N. for breaches of such contract.

Held, that such sum was the penalty named to secure a performance of the contract by P., and N. could only recover by showing a failure to perform and a loss resulting.

Held, also, that a complaint on such contract, to show a failure of performance in respect to the land in Hardin county, must aver that it had not been disposed of when such contract was executed.

Held, also, that the right to demand a conveyance of the land in Missouri could not be enforced, as the contract with reference thereto was invalid for want of a description.

PRACTICE.—Demurrer.—Motion in Arrest.—Judgment.—A court does not, by ruling wrongly upon demurrers, preclude itself from afterward ruling rightly upon a motion in arrest of judgment. It is the duty of the court not to permit a judgment upon a complaint so clearly insufficient as to afford no foundation therefor.

SAME.—Pleading.—Verdict.—A pleading will be sustained after verdict by every reasonable intendment that can be made from the facts pleaded; but the absence of an essential allegation can not be cured thereby.

From the Boone Circuit Court.

A. J. Palmer, J. W. Schuck and F. M. Charlton, for appellant.

H. W. Harrington, A. G. Howe and J. W. Clements, for appellee.

ELLIOTT, J.—The questions presented by this appeal arise upon the ruling of the court sustaining the appellee's motion in arrest of judgment. The complaint is based upon the following written contract, viz.:

“ZIONSVILLE, IND., March 24th, 1877.

“If an eighty-acre tract of land described as follows: The north half of the northeast quarter of section four (4), township eleven (11) south, of range eight east, located in Hardin county, Ill., be not disposed of at this date—said land being placed in the hands of a party for disposal—then J. A. Perrill agrees to make to J. J. Newman a warranty deed for above described land. If, however, it is negotiated

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and bargained to other parties, in whose hands it was left for disposition, then, in lieu of this, the said J. A. Perrill agrees to deed to the said J. J. Newman one hundred and sixty acres of land in any one of the following counties in the State of Missouri, viz.: Wayne, Butler, Shannon, Carter, Reynolds or Taney. Deed to be warranty. The above contract is made and given to satisfactorily arrange and adjust a difficulty between Jasper Jones, J. J. Newman and Henry Cushing. Now, should the said Perrill fail to comply with the above contract, he forfeits the sum of one thousand dollars to the said J. J. Newman; otherwise it is null and void. Land to be furnished in ninety days.

“J. A. PERRILL.”

There are no allegations in the complaint that in any wise assist in the construction of the contract, and it must be construed as it is written, without any aid from extrinsic matters. It is not alleged that the land in Hardin county, Illinois, had not been disposed of at the time the contract was executed. The breach assigned is that the appellee failed to convey the land in Hardin county, or to convey the land in Missouri, or to pay the appellant the sum of one thousand dollars, or any part thereof.

The appellant in his original brief insists that the contract sued on should be deemed a promise to pay the sum of one thousand dollars, with the privilege, if exercised within ninety days, of paying by the conveyance of property. The contract will not bear any such construction. The sum of one thousand dollars is the penalty named in the bond to secure the performance of the acts which the obligor undertook to perform. The obligee can only recover by showing the failure to perform and loss resulting.

The complaint does not show a failure of performance in respect to the land in Hardin county, Illinois, for the reason that it does not aver that the land had not been disposed of when the contract was executed. The appel-

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lee did not undertake to convey this land unconditionally, but only upon condition that it had not been disposed of by the party in whose hands it had been placed.

The right to demand a conveyance of lands in Missouri can not be enforced. The contract is one which the statute of frauds requires shall be in writing, and, as there is no real estate at all described, the contract is not valid. There is no attempt at description, and there is, therefore, no contract for the conveyance of lands. As the contract is invalid, there can be no right of action grounded upon it. *Dingman v. Kelly*, 7 Ind. 717; *Baldwin v. Kerlin*, 46 Ind. 426; *Miller v. Campbell*, 52 Ind. 125.

Appellant argues that, as the court had overruled demurrers to the complaint, it could not afterwards rightfully sustain a motion in arrest. We do not think that the court, by ruling wrongly upon the demurrers, precluded itself from afterwards ruling rightly upon the motion in arrest. If, when the motion was presented, the court deemed the complaint so clearly bad as not to be sufficient to sustain a judgment, it was right to arrest the proceedings at that stage, notwithstanding the fact that at an earlier stage the court had entertained a different opinion.

A complaint fatally defective is vulnerable to attack, even upon appeal, and there can certainly be no error in declaring a fatally defective complaint bad on motion in arrest, although demurrers may have been previously overruled. It is the duty of the court not to permit a judgment to be entered upon a complaint which is so clearly insufficient as to afford the judgment no foundation. There can be no valid judgment without a sufficient complaint, and, where a party's complaint is incurably bad, he can not justly complain of any ruling which prevented him from obtaining a judgment based upon it.

We are not unmindful of the doctrine that there are many defects which are aided by a verdict, nor have we any incli-

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nation to narrow that doctrine. But it is not every defect that a verdict will cure. The pleading will, after verdict, be sustained by every reasonable intendment that can be made from the facts pleaded. Chitty says: "The particular thing which is presumed to have been proved must always be such as can be implied from the allegations on the record, by a fair and reasonable intendment." 1 Chitty Pl. 705. In *Crawford v. C'rockett*, 55 Ind. 220, a motion in arrest was held to have been rightly sustained, because the complaint, which sought to enforce a mechanic's lien, did not aver that the materials were furnished for the building, although, in every other respect, the complaint was sufficient. In *Heddens v. Younglove*, 46 Ind. 212, it was held that a complaint which failed to aver a demand, in a case where a demand was essential to the cause of action, was bad on a motion in arrest. To the same effect is the case of *Pierse v. Thornton*, 44 Ind. 235. In *McMillen v. Terrell*, 23 Ind. 163, it was held that, where the complaint pleaded a contract, void by the statute of frauds, a motion in arrest ought to have been sustained. In *Sharpe v. Clifford*, 44 Ind. 346, a motion in arrest prevailed against a complaint seeking to enforce a mechanic's lien, for the reason that the complaint did not allege that notice of intention to hold a lien had been filed within the time prescribed by law. It was there said: "There is no allegation touching the question whether the notice was filed within the time required by the statute; consequently, we can not infer that there was any proof on the subject. The rule that, where a fact is alleged, though so defectively that the pleading would be demurrable, such defect may be cured by a verdict, and a motion in arrest defeated, does not apply in this case. There is no averment on the subject." The language of the court quoted applies with great force to the case in hand. There is not even an intimation that Perrill's land had not been disposed of when the contract was executed. There is no fact stated, nor any allegation made, from which

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any such intendment can be drawn. The complaint is entirely silent upon that subject ; not one word is said upon it. There is not even a hint, much less a substantive statement, authorizing the intendment that Perrill's agent had not disposed of the Hardin county land.

There can be no doubt as to the meaning of the contract. Perrill undertook to convey the land in Hardin county only on one contingency, and that was that it had not been disposed of. He did not undertake to convey unconditionally, but, upon the contrary, explicitly provides that in one case only will he agree to convey, and that case is, to borrow the language of the contract, "if it be not disposed of at this date—said lands being placed in the hands of a party for disposal." To make a *prima facie* case,—and all complaints must do that or be adjudged bad,—it was necessary that the complaint should aver that the Hardin county land had not been disposed of. Certainly it was necessary to state some fact from which it could be reasonably inferred.

We hold the complaint bad so far as concerns the Hardin county land, because it does not state some fact or facts, from which it can be inferred that the land had not been disposed of when the contract was entered into. We do not pronounce against it because of defective allegations, or insufficient statements, but, because there is a complete and absolute absence of all facts and all allegations upon that subject. If there were any facts or statements, upon which we could found an intendment in favor of the pleading, we should unhesitatingly declare that the motion in arrest should not be allowed to prevail.

Judgment affirmed.

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No. 7140.

SMITH v. BEARD ET AL.

MARRIED WOMAN.—*Contract of, Before Marriage.—Separate Property.—Personal Judgment.—Statute Construed.*—Section 3, 1 R. S. 1876, p. 550, provides for and authorizes a personal judgment against a married woman upon her contract made before marriage, to be levied of her property only, then owned or thereafter acquired by her.

SAME.—*Subsequent Coverture.—Real Estate by Virtue of Previous Marriage.—Descent.—Execution.*—Where real estate has descended to a woman by virtue of a previous marriage, and such woman subsequently marries again, such real estate can not, under section 18 of the law of descents, be levied upon and sold on execution against her during her subsequent coverture.

From the Johnson Circuit Court.

T. W. Woollen, for appellant.

Howk, J.—This was a suit by the appellee John Beard, against his co-appellees, Joseph Speigle and others, for the partition of certain real estate, particularly described, in Johnson county. After the commencement of the action, upon the application of the appellant, Maria Smith, she was admitted as a defendant in the suit, and she filed what was called an answer, but was, in fact, a counter-claim or cross complaint, against the appellee Beard, the plaintiff below, demanding affirmative relief therein.

The appellee Beard demurred to the appellant's cross complaint, for the want of sufficient facts therein, which demurrer was sustained by the court, and to this decision the appellant excepted. She then answered the complaint by a general denial thereof. The trial of the cause by the court resulted in a final judgment of partition, as prayed for in the complaint.

The only error assigned by the appellant in this court is the decision of the circuit court in sustaining the demurrer to her affirmative answer, or cross complaint.

The appellant, Maria Smith, alleged, in substance, that the appellee John Beard claimed to own the land mentioned in

73	150
132	311
73	150
146	403

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his complaint, by virtue of a deed to him, from Calvin Webb and wife, dated on the — day of —, 187—; that said Webb obtained his title to said land by deed from the sheriff of said Johnson county, on a sale made under a judgment against Ambrose Smith and said Maria Smith, the appellant, which deed was dated on the — day of —, 187—, and copies of the two deeds were therewith filed. And the appellant averred that, on the — day of —, 1863, Philip I. Speigle, then the husband of the appellant, died, leaving surviving him the appellant, his widow, and the other defendants to this suit, his children and heirs at law, who were, also, her children; that, at the time of his death, the said Philip I. Speigle was seized, in fee simple, of the lands in the complaint mentioned; that afterward, and while the appellant was sole, and remained the widow of said Philip, to wit, on January 2d, 1865, she executed to one Moses R. Gilmore her certain promissory note for \$141, due one day after date; that afterward, on the — day of —, 1868, the appellant intermarried with Ambrose Smith, who had since been, and then was, her husband; that, before her said second marriage, the appellant had paid to said Gilmore, on said note, all thereof but \$25; that afterward, and while the appellant was the wife of said Ambrose Smith, the said Gilmore having transferred her said note to one Calvin F. Webb, he, the said Webb, brought suit thereon against her and her husband, Ambrose Smith, before a justice of the peace of said Johnson county, and recovered a judgment against her and her said husband, on said note, for the sum of \$38.74 and costs, to be executed without relief from valuation or appraisement laws; that the said Calvin F. Webb, having obtained a return of *nulla bona* to an execution issued to a constable, took a transcript of said judgment and filed the same in the clerk's office of the court below, and obtained thereon an execution directed to the sheriff of said county, who, by virtue thereof, levied upon and sold

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the appellant's interest in said land, and the same not having been redeemed within one year from said sale, to wit, on the —— day of ——, 1874, the said sheriff executed a deed to the said Calvin F. Webb, who was the purchaser at said sale, for all the interest of the appellant in said land, and the said Calvin F. Webb afterward conveyed the title thus obtained to the appellee John Beard.

And the appellant further said that the said judgment and proceedings before the said justice of the peace showed that at the time of the institution of said suit, and of the rendition of said judgment, she, the appellant, was a married woman, and that, by reason thereof, no personal judgment could be rendered against her, and the same was void. Wherefore the appellant demanded judgment against the appellee John Beard, the plaintiff below, that he should not have and maintain his said action for partition, etc., and for all other proper relief.

It is proper that we should note the fact, in the outset of our examination of the questions presented for our decision, that the appellee John Beard has not favored this court with any brief or argument in support of the decision of the circuit court in his favor.

In his complaint for partition, the appellee Beard claimed to be the owner in fee simple of the undivided one-third of the land described therein, being the same interest which descended to the appellant, as widow, upon the death of her first husband, Philip, I. Speigle. The appellant's counsel claims that, in her answer or cross complaint, the appellant showed two objections to the plaintiff's right or claim of title, as follows:

"1. That the land descended to her from her former husband as her third, under the statute, and that it was sold on a judgment rendered against her, during her second coverture, she being still married at the time of the sale, and having children by her former husband;

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“2. That the record of the judgment showed that she was a married woman at the time, and that a personal judgment was rendered against her.”

In his brief, counsel says: “As to the second question raised by the answer, I have but little to say, but think the rule is this: Where the plaintiff does not show that the defendant is a married woman, she must set it up; where it is disclosed in either way, judgment can only go against her separate property.” In support of his view of the rule in such cases, counsel has cited section 3 of “An act touching the marriage relation and liabilities incident thereto,” approved May 31st, 1852. This section provides that “When any woman, against whom any liability exists, shall marry, and has or acquires lands, judgment on such liability may be rendered against her and her husband jointly, to be levied of such lands only.” 1 R. S. 1876, p. 550. It seems to us that this section of the statute does not support the view of counsel, in regard to the judgment which may be rendered against a married woman, upon her contract executed before her marriage. On the contrary, we think that this section, fairly construed, provides for and authorizes a personal judgment against a married woman upon her contract made before her marriage, to be levied of her property only, then owned or thereafter acquired by her. We are of the opinion, therefore, that the judgment against the appellant, described in her answer or cross complaint, was legal and valid, and not void on account of her coverture.

As to the first objection raised by the answer or cross complaint to the plaintiff's right or claim of title, counsel claims in argument that the case of *Schlemmer v. Rossler*, 59 Ind. 326, is decisive of the question presented, in the appellant's favor, and in this respect we fully agree with the claim of counsel. In the case cited, it was held by this court that, under the provisions of section 18 of the law of descents, where real estate has descended to a woman by virtue

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of her marriage with a deceased husband, and such woman subsequently marries again, the real estate so held by her can not be levied upon and sold on execution against her, during her subsequent coverture. We adhere to the rule thus laid down as being, we think, the safer and wiser one, under the restrictive provisions of said section 18 of the law of descents.

Applying this rule to the case at bar, it seems to us that the facts alleged by the appellant in her answer were sufficient, if true, and the demurrer admitted their truth, to show that the plaintiff below, John Beard, had no valid right or claim of title to the interest in the land, which had descended to the appellant, as widow, from her deceased former husband, and was held by her during her subsequent coverture, at the times of the sheriff's levy, sale and conveyance thereof.

We are of the opinion, therefore, that the court erred in sustaining the demurrer of the appellee Beard to the appellant's answer or cross complaint.

The judgment is reversed, at the costs of the appellee John Beard, and the cause is remanded with instructions to overrule his demurrer to the appellant's answer, and for further proceedings in accordance with this opinion.

 7528.

BUNNELL v. BUNNELL.

WILL.—Evidence.—Extrinsic evidence is not admissible to alter, detract from or add to the terms of a will; nor is parol evidence admissible to correct a supposed mistake in a will.

SAME.—Purchase of Legatee's Interest.—Agreement.—Parol evidence of an agreement to purchase the interest of a legatee in a testator's estate does not tend to contradict or vary the terms of the will, even though

73	160
124	41
73	163
129	62
73	163
132	188

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such agreement involves a release from an obligation imposed by the will upon such purchaser.

SAME.—Release of Legacy.—A legatee may release another from the payment of the legacy, although payment be expressly charged upon the land devised to the person charged with its payment.

From the Clinton Circuit Court.

J. A. Stein, J. Claybaugh and B. K. Higinbotham, for appellant.

L. McClurg and J. V. Kent, for appellee.

ELLIOTT, J.—Appellant was the plaintiff below. He sets out in his complaint a will executed by Noah Bunnell, deceased, the father of the parties to this action. Item 1st bequeaths to the testator's wife the rents and profits of all his real estate; and item 2d, all his personal property. Item 3d is the one upon which this controversy arises, and is as follows: "3d. In consideration of the advances made to my children, and the payments to be made by my son Noah Livy Bunnell, after my decease, to equalize the proceeds of my estate among all my dear children, I will and bequeath to my youngest son, Noah Livy Bunnell, all my real estate, on condition that he will pay and satisfy my son Seneca Bunnell the sum of one thousand five hundred dollars in one year from my decease and the decease of my beloved wife; and that my two sons, Daniel James' and Seneca, pay to my daughter, Harriet Chaney, the sum of two hundred dollars in one year." The complaint alleges that the testator died the owner of the lands described in item 1st; that his widow took under the will; that she died on the 27th day of July, 1876; that since her death Noah L. Bunnell has been the owner of said lands under said will, and in possession thereof; that more than a year has elapsed since the death of the said widow; that demand has been made of said Noah L. Bunnell for the sum of \$1,500, and that he wholly failed and refused to pay said sum or any part thereof.

The first question which the record presents arises upon

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the ruling of the court upon appellant's demurrer to the amended second paragraph of appellee's answer. This paragraph admits the allegations of the complaint, but endeavors to avoid them by affirmative matter. The substantive allegations of the paragraph under mention may be thus summarized: At the time of the execution of the will, appellee had advanced appellant \$1,500, which was paid by appellee, and received by the appellant, as an advancement upon his interest in the father's estate; that the advancement was made pursuant to a contract previously entered into between the parties, in which appellee had agreed to give, and appellant to accept, \$3,000 for all his right and interest in the said testator's estate; that, at the time of the execution of the will, there was due from appellee upon such contract \$1,500; that the testator knew of said contract and advancement of \$1,500 by appellee, and that, for the purpose of compelling the carrying out of the said contract, incorporated in his will the provisions of item 3d. It is also averred, in conclusion, that the appellee paid to appellant the said sum of \$1,500; "that it is the sum which would be due the appellant, if said contract was carried out according to the terms thereof;" and that the said payment was made since the execution of the will.

The second question presented arises upon the ruling on the demurrer to the third paragraph of appellee's answer. This paragraph is very similar to the second. In two particulars it differs from it. The first point of difference is that the third paragraph avers that the testator was a party to the contract wherein appellant sold his interest to appellee. The second point of difference is that the allegation of payment in the third paragraph is much more full and explicit than in the second. We quote the averment of the third paragraph, as to payment: "Defendant further avers that, at the time of the payment of said fifteen hundred dollars, plaintiff well knew of the existence and contents of said

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will ; also, that defendant was paying said sum in discharge of his obligation created by said will, and plaintiff then and there so received and accepted the same.”

Appellant contends that both of these paragraphs were bad, and that the demurrers ought to have been sustained. It is said that they are bad because they attempt to vary the provisions of the will by parol. The appellant is unquestionably correct in saying that extrinsic evidence is not admissible to alter, detract from, or add to, the terms of a will. It is also true that parol evidence is not admissible to correct a supposed mistake in a will. The case of *McAlister v. Butterfield*, 31 Ind. 25, affords a very striking illustration of this rule. The answers contain allegations which do seem to trench upon the rule referred to, but, independently of these allegations, we think a defence is stated. What is stated in the answers, as to the knowledge and intent of the testator, may be rejected as surplusage, and a valid defence will remain. Rejecting all such matters, we find these material facts: That appellant agreed to sell to appellee all his interest in the estate of the father for \$3,000 ; that, on this contract, \$1,500 was paid before the execution of the will, and the remainder after its execution ; and that the last payment was made in discharge of the obligations imposed upon appellee by the will. It thus appears that there was a contract, that it was fully performed by the appellee, and that this performance was accepted by the appellant. Having accepted performance of this contract, as the demurrer admits the appellant did, the latter is not in a situation to demand the legacy bequeathed by the will, in addition to the \$3,000 already paid to, and received by, him for his right and interest in the estate of his father. The will is not affected by such a contract and its performance. The obligation imposed by the testator is, however, extinguished.

It is argued with ability and earnestness, that the answers are bad because they set up an erroneous construction of the

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will. Counsel are right in affirming that an answer is bad which alleges as a defence a construction which the instrument will not bear. There are some portions of the answers under examination which deserve the censure which counsel bestow upon them, but there are also the material facts, already mentioned, directly stated, and fully admitted by the demurrers, which, in our judgment, make the answers good.

The ruling denying a new trial is assigned for error. Complaint is made of the action of the court in admitting evidence of the agreement of appellee to purchase the interest of appellant in the estate of their father. In this ruling there was no error. The evidence did not contradict, vary or alter the terms of the will. The agreement proved was altogether distinct from, and independent of, the will of Noah Bunnell. It is true, as appellant contends, that the evidence could not alter the provisions of the will, but this does not prove it to have been incompetent. It was competent, not for the purpose of varying the will, but for the purpose of showing a contract between appellant and appellee, whereby the latter acquired the interest of the former in his father's estate and a release from the obligation imposed by the father's will. Nor was the evidence competent for the purpose of construing the will, although there are cases where it is proper to prove the surrounding circumstances; but it was competent for the purpose of showing an extinguishment of the liability imposed upon the appellant by his father's will. It was proper to prove the contract, performance and acceptance; and, when this was satisfactorily done, the appellant was released from payment of the sum charged upon the real estate devised to him. The legatee had a right to sell, and the appellee a right to buy, the legacy; and, if the former entered into a contract fully extinguishing such legacy, his rights were gone as soon as the appellee had fully performed his part of the contract. It can not be doubted that a legatee may release another from payment of the

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legacy, although payment be expressly charged upon the land devised to the person charged with the payment of the legacy.

It is vigorously insisted that the verdict is not sustained by the evidence. We have carefully read the evidence, and have found some evidence sustaining the verdict, although it is not of the most satisfactory character. The evidence is not, it is plain, very fully stated in the bill of exceptions, and we can not secure as full an appreciation of its force and effect as the court and jury who tried the cause; therefore, we deem it better to allow their conclusion to remain undisturbed.

Judgment affirmed.

No. 7900.

THE TERRE HAUTE AND INDIANAPOLIS R. R. Co. v. CLARK,
ADMINISTRATOR.

PRACTICE.—*Answers to Interrogatories.*—*Verdict.*—*Judgment Non Obstante.*—*Bill of Exceptions.*—*Supreme Court.*—An exception to the ruling upon a motion for judgment upon answers to special interrogatories, notwithstanding the general verdict, presents such question to the Supreme Court without any bill of exceptions.

NEGLIGENCE.—*Railroad.*—*Rate of Speed of Trains.*—In an action by the administrator of a decedent against a railroad company for causing his death at a railroad crossing, by negligently running a train of cars over such crossing, the rate of speed of such train, in connection with other circumstances, may be considered in determining the question of negligence; but the rate of speed at which a train can be run with safety to the passengers can not, in itself, be deemed negligence as against one who is injured thereby at such a crossing.

SAME.—*Contributory Negligence.*—*Damages.*—Where, in such action, it is shown that the deceased, possessed of all his faculties, and knowing the existence and location of the railroad, and presumably familiar with the time of the trains running thereon, approached the railroad

73	168
128	143
128	520
73	168
131	40
73	168
136	43
73	168
140	579
142	624
73	168
166	11

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crossing in a covered wagon, with no opening except in front. without stopping still at any point to look or listen for an approaching train, and, for a distance of more than forty yards from such crossing, drove his team in a trot, without stopping or looking, until he reached the crossing where he was run over and killed, such conduct is contributory negligence on the part of the deceased, and is sufficient to bar an action by his administrator to recover damages for his death.

From the Hendricks Circuit Court.

J. G. Williams and *L. M. Campbell*, for appellant.

J. V. Hadley, *J. O. Parker*, *E. G. Hogate* and *R. B. Blake*, for appellee.

WOODS, J.—The action was by the appellee against the appellant for causing the death of William Spaulding, the appellee suing as administrator of the estate of the deceased.

The complaint is in two paragraphs.

In both paragraphs it is shown that on the 30th day of January, 1878, the said William Spaulding was travelling in his wagon, drawn by two horses, along a public highway leading from the Cumberland road, in Hendricks County, Indiana, to the town of Danville, in the same county, which highway is known as the “Danville and Cartersburg Gravel Road,” and crosses defendant’s railroad in the midst of the town of Cartersburg, in said county of Hendricks.

The gravamen of the cause of action is stated in the first paragraph as follows, viz. :

“And the plaintiff says that, as the said William Spaulding had reached the said crossing in said town of Cartersburg, the defendant carelessly and negligently caused one of its locomotives, with a train of cars attached thereto, to approach said crossing, and then and there pass at a great and unusual rate of speed over the track of said railroad, and without proper care, and negligently and carelessly omitted, while so approaching said crossing, to give any reasonable, timely or proper signals, by ringing the bell or sounding the steam whistle at a reasonable and proper distance from said crossing, by reason whereof he (Spauld-

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ing) was unaware of their approach, and that, by reason of said negligence and carelessness of said defendant, her servants and employees, and, without any fault or negligence on his part, the said locomotive struck his horses and wagon on said crossing, thereby injuring said horses and demolishing said wagon, and instantly killing said William Spaulding."

In the second paragraph of the complaint the same state of facts is shown, but the defendant is charged with having "carelessly, recklessly, purposely, wilfully and negligently" caused the death of Spaulding.

The answer was a general denial. Two trials by jury were had. The first jury failed to agree. The second gave a general verdict for the plaintiff, assessing the damages at one thousand dollars, and judgment was given accordingly. The jury returned answers to special interrogatories, and on these the appellant moved for judgment, notwithstanding the general verdict, and excepted to the overruling of the motion. No bill of exceptions was filed to show this exception; and counsel for the appellee claim that no question is saved for the consideration of this court. The point has been ruled against the position of counsel in *Salander v. Lockwood*, 66 Ind. 285, overruling, in this respect, *Shaw v. The Merchants National Bank*, 60 Ind. 83, and following, though not citing, *Campbell v. Dutch*, 36 Ind. 504.

The counsel for the appellant insist that the answers to interrogatories show affirmatively that the defendant was not guilty of the negligence charged; and that the deceased was guilty of negligence, causing or contributory to the cause of his death.

The following are the interrogatories and answers of the jury, so far as pertinent to the questions to be decided:

"1. If the deceased, William Spaulding, had stopped his team at any point within a distance of 150 yards from the railroad crossing, could he have heard the sound of the approaching train? Answer. Yes.

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“2. If the deceased had approached the railroad crossing, driving only in a walk, and had looked out for the train at a distance of 30 feet therefrom, could he have stopped his team before reaching the track? Answer. Yes.

“3. If the deceased had looked in a westerly direction, at a point 60 feet south of the crossing, could he have seen the approaching train in time to stop his team before reaching the track? Answer. No.

“4. Was the defendant's train, on the evening of the 30th of January, 1878, at the time of the death of said Spaulding, being run at a greater rate of speed than was usual or customary for that particular train, at that hour of the evening? Answer. No.

“5. Had not the defendant, for a long period of time prior to the 30th of January, 1878, run a fast mail and express train east at about the same hour each evening, and at about the same rate of speed at which the train was going on said January 30th? Answer. Yes.

“6. Could the deceased, by the use of ordinary care and prudence, on the evening of said date, have stopped his team before reaching the railroad crossing, and avoided the accident? Answer. No.

“7. Did not the agents of the defendant, in charge of the train which killed the deceased, sound the whistle and give the signal at the usual distance from the crossing, viz., about 800 feet west from the same? Answer. Yes.

“8. Did not the deceased, at a distance of more than one hundred feet south of the crossing, hear the sound of the approaching train, and attempt to cross the track before it? Answer. No evidence.

“9. Did the engineer in charge on the 30th of January, 1878, see the deceased about to drive upon the track, or did he have reason, from what he saw, to suppose the deceased was about to drive upon the track, in sufficient time to stop his train and prevent the collision? Answer. No.

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“10. Did not the deceased drive his team in a trot towards the railroad crossing, for the distance of more than forty yards, without stopping to look or listen for an approaching train? Answer. Yes.

“11. Did not the deceased drive on the railroad crossing without stopping still at any point to look or listen for an approaching train, and was he not at the same time in a covered wagon, without any opening except in front? Answer. Yes.

“12. What direction was the train going by which Spaulding was killed? Answer. East.

“13. What direction was the wind blowing on said evening? Answer. From the east.

“14. Was it not snowing considerably at the time the deceased drove on the railroad track and was killed? Answer. Yes.”

There is not enough shown by these answers to interrogatories to enable us to say, as matter of law, that either the appellant or the deceased was free from negligence, causing or contributing to the injury. All that is found concerning the conduct of the appellant is in questions 4, 5, 7 and 9, and the answers thereto, but, notwithstanding these, there may have been proof of negligence. For instance, while it is shown that the whistle was blown eight hundred feet or more away, it is not found that the bell was rung as the train approached the crossing. The rate of speed is not found, and, though that train was not running faster than usual, its usual rate may have been very great, too great to be safe or justifiable. We do not mean to be understood as saying or intimating that any rate of speed, at which a train can be run with safety to the passenger, can in itself be deemed carelessness as against one who gets hurt at a crossing. The tendency of the times seems to be—indeed, the sentiment now apparently prevails—that the railroads shall run trains for carrying the passengers and mails at high

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rates of speed, and the rights of individuals, and the degree of caution which they must use in passing over the railroad tracks, must be measured and adjusted accordingly. Still, it is, and doubtless will remain, true that the rate of speed, in connection with other circumstances, may be considered in determining the issue of negligence in such cases as the one under consideration.

It remains to be considered whether the deceased was free from fault. It is not found that he knew there was a railroad in the vicinity, and did not come upon it all unaware of the train's approach. He drove his team in a trot towards the crossing for the distance of more than forty yards, without stopping to look or listen; but this may, for all that is found, have happened before he came within a mile or ten miles of the crossing. He drove on the railroad crossing without stopping still at any point to look or listen, but there is no rule which requires a man with a team to stop still. It would in many cases, perhaps, be impossible to do so, and, under supposable circumstances, it would not be necessary to stop, either to look or listen.

We think it quite clear that the court committed no error in overruling the appellant's motion for judgment on the special findings, notwithstanding the general verdict.

The appellant made a motion for a new trial, on written reasons filed, viz., that the verdict is not sustained by sufficient evidence, and is contrary to law, which the court overruled. This motion, we think, should have been sustained. There was no real conflict in the evidence, and what is lacking in the special findings to show negligence on the part of the deceased is fully supplied in the evidence, and there is no evidence at all to support the charge in the second paragraph of the complaint, that the defendant purposely and wilfully caused the death. Indeed, it is by no means clear that the evidence shows any negligence on the part of the defendant. But it does show that the deceased, possessed of all his fac-

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ulties, and knowing the existence and location of the railroad, and presumably familiar with the time of the fast train, which had been running regularly for some time before, approached the crossing in a covered wagon, with no opening except in front. When about fifty yards from the crossing, he was seen by one witness to check his team, lean forward and look to the east and to the west, and thence he drove on in a trot, without stopping or looking until he reached the crossing, at which instant the horses stopped for a moment, whether through fright or the pulling of the lines by the deceased, is uncertain, and then sprang across the track, the engine striking the wagon and instantly killing said Spaulding. On the west side of the highway on which the deceased approached the crossing, there were, in some places, buildings which obstructed the view in the direction of the railroad to the westward, and one of these buildings stood but thirty feet south of the railroad track. The other material facts are shown by the answers to the interrogatories. If the deceased heard the coming train, as many of the witnesses heard it, as he approached the crossing, his death was either a suicide or the result of gross carelessness; but, whether he heard it or not, his driving upon the crossing in a trot, under the circumstances, was certainly such contributory negligence on his part as bars the action of his administrator for his death.

The counsel for the appellee insist that the presence of the houses obstructing the view, and the fact that it was snowing, were circumstances that made it gross negligence on the part of the appellant to move its train at the rate of speed at which it was running at the time of the accident. It seems to us, on the contrary, that these were circumstances which enhanced the degree of caution with which the deceased ought to have approached the crossing.

The judgment of the circuit court is reversed, with costs, and with instructions to grant a new trial.

Urmston *et al.* v. The State, *ex rel.* Kuehn.

No. 7736.

73	175
126	403

URMSTON ET AL. v. THE STATE, EX REL. KUEHN.

OFFICIAL BOND.—Construction.—Undertakings in official bonds, as against the surety, are to be strictly construed.

SAME.—Liability of Surety.—A surety on an official bond can not be held bound for a longer period than that limited by his undertaking.

SAME.—Constable.—Pleading.—Complaint.—Presumption.—A constable appointed “for the term of one year from the 3d day of March, 1875, until his successor shall be elected and qualified,” gave bond, with surety, accordingly. On the 4th day of October, 1876, an execution was placed in his hands, upon which he collected money, and, for failure to pay over the same, suit was instituted on his bond.

Held. that the complaint therein must show, as against the sureties, that a successor to such constable had not been elected and qualified.

Held, also, that, in the absence of such averment, it will be presumed that a successor had been elected and qualified, and that the official term of such constable had expired, when the execution came into his hands.

ELECTIONS.—Judicial Knowledge.—The Supreme Court takes judicial knowledge of the time of holding general elections.

From the Franklin Circuit Court.

J. F. McKee, ——. *McKee, F. Berry, H. Berry* and *S. E. Urmston*, for appellants.

W. H. Bracken and *S. E. Harrell*, for appellee.

ELLIOTT, J.—This was an action by appellee against Alonzo Urmston and the sureties on his official bond as constable. Relator obtained judgment below, and from that judgment appellants, who were the sureties of said constable, appeal, the principal, Alonzo Urmston, refusing to join. The only error relied upon by counsel, in their brief, is the overruling of their demurrer to appellee’s complaint. This error is well assigned. It appears that said bond was executed on the 3d day of March, 1875, the condition being as follows: “The condition of the above obligation is such that, whereas the above named and bounden Alonzo Urmston has been duly appointed by the board of commissioners of said county, constable for Brookville township, in the county aforesaid,

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for the term of one year from the 3d day of March in said year 1875, until his successor shall be elected and qualified: Now, if the said Alonzo Urmston shall faithfully discharge all the duties required of him by any law now or subsequently in force, then this obligation shall be void; otherwise to remain in full force and virtue in law.”

On the 4th day of October, 1876, appellee placed in the hands of Alonzo Urmston an execution to be levied by him. In November of the same year, said Urmston collected the money on this execution, and converted it to his own use, refusing to pay it over to relator.

The undertaking of the sureties was that their principal should properly discharge the duties of the office of constable for a designated period. The period designated by the bond is for one year, or until the constable's successor shall be elected and qualified. It certainly can not be construed to extend beyond the election and qualification of a successor. If, however, it is to be construed as covering a period of one year, then the wrongful acts complained of were clearly not done within the time provided for by the bond. A surety can not be held bound for a longer period than that limited by his undertaking, and such undertakings, as against the surety, are to be strictly construed. *Mullikin v. State*, 7 Blackf. 77.

Construing the bond as limiting the period of appellants' liability to the time embraced within the date of the bond and the election and qualification of a successor to their principal, it had presumptively terminated when the appellee's execution was delivered to the constable. The moment a successor was elected and qualified, the sureties ceased to be liable on their undertaking. For acts done within the term they of course remained liable, but with the expiration of the term their liability as to all other acts ceased.

The complaint is bad for the reason that it does not show that a successor to appellants' principal had not been elected

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and qualified. In the absence of an averment to the contrary, the presumption is that a successor had been elected.

It is provided that "vacancies in the office of constable shall be filled by appointment," and that the person so appointed shall "hold until a successor is elected and qualified, who shall be elected at the next township election." 1 R. S. 1876, p. 922. We know judicially that a township election was held on the second Tuesday in October, 1875, at which a successor ought to have been, and we must presume was, elected. The presumption, until rebutted, must be that the official term of the appellants' principal had expired when the execution was delivered to him. The undertaking of the appellants was to answer for his acts as constable, and as he was not, as we are bound to presume, an officer at the time the wrongful acts complained of were done, they can not be held liable on the bond sued upon. *Rany v. The Governor*, 4 Blackf. 2.

Judgment reversed.

No. 7479.

CRESS ET AL. v. HOOK.

PLEADING.—Injunction Bond.—Record.—Variance.—In an action upon an injunction bond, it is necessary to file such bond, or a copy thereof, with the complaint, as an exhibit; but a copy of the record of the injunction suit ought not to be filed therewith, and, if so filed, any variance between the complaint and such copy is immaterial.

SAME. — Proof of Averments of Complaint — Where, in such action, the plaintiff, who was a clerk in a drug store, alleged in his complaint that the defendants had obtained an order restraining him "from pursuing his said employment," such allegation is supported by proof of an order restraining him from selling, removing, or otherwise disposing of or encumbering, etc., such stock of drugs.

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From the Marion Circuit Court.

T. S. Rollins and *G. W. Stubbs*, for appellants.

W. P. Adkinson and *J. M. Johnson*, for appellee.

WOODS, J.—The appellee sued the appellants, before a justice of the peace, on an injunction bond, and obtained judgment; and, on appeal by the defendants to the circuit court, again recovered, but for a smaller sum. The court, upon request of the parties, found the facts specially, and made a statement of legal conclusions thereon. Error is assigned upon these conclusions, and upon the overruling of a demurrer to the complaint. Counsel, however, have discussed but one question, though with reference to the complaint and to the conclusions of law.

The objection, as made to the complaint, is, that there is a variance between the averments of the complaint as to what the injunction was, and the copy of the injunction filed therewith. There is nothing in the objection, no matter how wide the variance. The injunction bond is the foundation of the action, and a copy thereof must have been filed in order to make the complaint good, but the copy of the record of the injunction suit ought not to have been filed, because not the basis of the action. It was superfluous, and its contents can not be considered as adding to or detracting from the complaint. The cases on this subject are numerous, and citation unnecessary.

The same question recurs in reference to the conclusions of law. We therefore state enough of the case to afford a proper understanding of the point to be decided. The complaint shows that, at the time of the issuing of the injunction against him, the plaintiff was employed as a clerk and salesman in a certain drug store, at a salary of fifty-five dollars per month, and that the defendants, Cress and another, instituted an injunction suit against him, and obtained an order of the court restraining him “from pursuing his said

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employment," which order remained in force from August 23d to November 21st, 1877, when the case was dismissed. The restraining order, as the court found it, was of the tenor following, viz.: "The defendant, Francis Hood, is herewith restrained from selling, removing or otherwise disposing of, or in any way encumbering, a certain stock of drugs, contained in," etc. (describing the store where the plaintiff was employed), "or from exercising any authority, control or power of disposition whatever over said goods, drugs and fixtures therein."

We can not agree with counsel that this order does not support the averment of the complaint. If the plaintiff refrained from doing the things thereby forbidden him, it is difficult to see that there was left to him anything to do in "pursuing his said employment" as a clerk in said drug store. As the whole argument of counsel turns upon this point, we have deemed it unnecessary to give any fuller statement of the record.

Judgment affirmed, with costs.

No. 7697.

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INDEMNITY BOND.—Principal and Surety.—Release of Surety.—Where the obligation of a bond is that the obligors are to pay, or cause to be paid, "any and every indebtedness or liability now existing, or which may hereafter in any manner exist," on the part of the principal, to M. & Co., it will include a note afterward given on an account accruing after the execution of such bond, by the principal to said M. & Co., and the fact that such note was antedated, but dated subsequent to the execution of the bond, and made payable twelve months after date, does not release the surety on such bond.

SAME.—Assignment of Note secured by Bond.—An assignment of such note

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carries with it an assignment of the bond so far as may be necessary for the security of the payment of the note, but an assignee of such bond can not sue thereon without an assignment of an indebtedness secured thereby.

PROMISSORY NOTE.—Endorsment.—Pleading.—In an action by the endorsee of a promissory note against the maker, it is not necessary to set out in the complaint a copy of the endorsement, although proof of the endorsement under which he claims title is necessary to a recovery.

From the Daviess Circuit Court.

W. Armstrong and S. E. Kercheval, for appellants.

W. R. Gardiner and S. H. Taylor, for appellee.

ELLIOTT, J.—The complaint of the appellee alleges that on the 21st day of May, 1877, the appellants executed to James M. Marshall & Co. a writing obligatory, wherein Sullivan as principal, and Morgan as surety, bound themselves in the penal sum of five hundred dollars to the said obligees. The condition of the obligation is thus stated: “The condition of this obligation is such that, if the above bounden John W. Sullivan and Abel T. Morgan, [their?] heirs, executors or administrators, shall well and truly pay, or cause to be paid, any and every indebtedness or liability now existing, or which may hereafter, in any manner, exist or be incurred on the part of the said John W. Sullivan to the said James M. Marshall & Co., whether such indebtedness or liability shall exist in the shape of book accounts, notes, leases, renewals or extensions of notes or accounts, or upon other contracts and agreements, verbal or written, acceptances, endorsements, guaranties or otherwise, hereby waiving presentment for payment, notice of non-payment, protest and notice of protest, and diligence in the collection of all notes, contracts or leases, agreements, verbal or written, now or hereafter executed or made and entered into, endorsed, transferred, guaranteed or assigned by the said John W. Sullivan to the said James M. Marshall & Co., as aforesaid, then this obligation

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is to be void ; but otherwise to remain in full force and effect."

It is also alleged that the appellant Sullivan executed to the said Marshall & Co. his promissory note, dated June 23d, 1877, for the sum of three hundred dollars. The complaint avers that the obligation of Sullivan and Morgan, and the note of the former, were indorsed in writing to the appellee, but copies of the endorsements are not set out. The complaint also alleges that the note is due and unpaid. A demurrer addressed to the complaint, by the appellants, was overruled, and of this ruling the appellants now complain.

It is contended by the appellants, that the condition of the obligation sued on is not broad enough to cover the note set forth by the appellee. There is no force in this objection, for the note falls within the express terms of the instrument. Nor is there any force in the objection stated by counsel, that the complaint does not set out copies of the endorsements of the note and obligation. The complaint is not founded on the endorsements, and it was not necessary to set out copies of them. *Keith v. Champer*, 69 Ind. 477.

Demurrers were sustained to the third, fourth and sixth paragraphs of the answer of the appellant Morgan. These paragraphs are substantially the same ; at all events, the facts set forth are so nearly identical that a separate consideration of each is unnecessary. The material allegations may be thus summarized : Sullivan, the principal, became indebted to Marshall & Co. for \$335, on account. Without the knowledge of the surety, Morgan, he executed a promissory note for that sum, and Marshall & Co. received and accepted the note in full payment.

These paragraphs were clearly bad. The obligation sued on embraced notes as well as accounts. It is entirely immaterial what form the evidence of Sullivan's indebtedness was thrown into. The obligation extended to all. One of the paragraphs avers that the note was, without the consent of the

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surety, antedated some weeks ; but this does not affect his liability, for it affirmatively appears that the items of the account, for which the note was executed, accrued after the obligation was executed, and that the date of the note was also subsequent to that of the joint undertaking, in which Morgan bound himself as surety for Sullivan.

These answers present no question as to the effect of extending time to a principal without the consent of the surety. Appellants' counsel are mistaken in supposing that the appellee, by receiving a promissory note payable twelve months after date, extended the time of the payment of the obligation upon which the surety was bound. The surety expressly obligated himself to pay "all indebtedness" of his principal, "whether such indebtedness shall exist in the shape of book accounts, notes, leases, renewals or extensions of notes or accounts."

The appellants insist that their motion for a new trial ought to have been sustained because there is no evidence that the note sued on was endorsed to the appellee. The evidence upon this point consisted of the note and the following written endorsements: "For credit James M. Marshall & Co., July 24th, '78, paid 31. Pay J. M. Marshall & Co., or order. E. W. Smith, Sr., per H. R. Brown, Att'y." These endorsements, so far from showing title in the appellee, show that it is in J. M. Marshall & Co. The last endorsement was to, not by, them, and as they are shown to be the last endorsees of the note, they, and not appellee, are to be deemed the owners. It was necessary for the appellee to prove title as laid, and upon this point there is an entire failure of proof. *Jackson Township v. Barnes*, 55 Ind. 136 ; *Wallace v. Reed*, 70 Ind. 263.

Appellee's counsel attempt to supply the missing link in their chain of evidence by arguing that the action is upon the obligation and not upon the note, and that it was, therefore, unnecessary to show any endorsement of the latter.

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This argument is fallacious. The bond was executed to secure the indebtedness of the principal, and in itself neither creates an indebtedness nor furnishes evidence of indebtedness. The note is the only evidence of indebtedness, and the endorsee or holder thereof the only one having any claim against the obligors in the bond described in the complaint. The evidence shows that the only claim held against Sullivan is that evidenced by the note set out by the complaint, and no one except the person having title to such note can have a right to enforce collection of the penalty named in the bond. The security afforded by the bond is really the incident, and the note executed by the debtor the principal. With the assignment of the note the bond would pass, not the note by the assignment of the bond.

Judgment reversed, at costs of the appellee.

No. 7379.

THE TRAYSER PIANO CO. v. KIRSCHNER.

PRACTICE.—*Motion to have Pleading made Specific.*—*Supreme Court.*—

Defects and uncertainties in a pleading which states sufficient facts can not be reached by demurrer, but only by a motion to make certain or to supply the defect; and the Supreme Court will not reverse a judgment on account of the refusal of the court to sustain such a motion, unless it be made to appear that the party has, or reasonably may be presumed to have, suffered harm from such ruling.

From the Wayne Circuit Court.

C. H. Burchenal, for appellant.

A. C. Lindemuth and *H. U. Johnson*, for appellee.

WOODS, J.—Action by the appellee against the appellant. Finding and judgment for the plaintiff. The assignments

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of error are predicated on the action of the court in overruling the demurrers of the appellant to the respective paragraphs of the amended complaint, its motion to have the plaintiff required to make some of the paragraphs more specific, and its motion for a new trial, to each of which rulings exception was taken.

Counsel for the appellant has made no argument or suggestion in reference to the motion for a new trial. We are therefore relieved from considering it. There is, too, no question in the record in reference to the rulings on the demurrers.

The transcript shows that the original complaint was filed on the 19th day of January, 1878, in the Wayne Circuit Court, and, the case having been transferred by agreement to the Wayne Superior Court, an amended complaint was filed on June 4th, 1878, to which the appellant filed her demurrer two days afterwards, which was overruled. On the 12th the plaintiff filed his (second) amended complaint, which alone is contained in the transcript, and to this the appellant answered without demurring. It is clear, therefore, that there was no ruling upon a demurrer to the complaint on which the issues were formed and tried.

A bill of exceptions in the record shows that the motion to have the complaint made more specific was filed June 12th, and after the filing of the amended complaint, but it is not clear whether it was filed before or after the last amended complaint was filed. The motion was sustained in so far as it asked for a more specific bill of particulars, but overruled in so far as it requested "the name of the officer or person, acting on behalf of the defendant, who made the alleged contract and agreement with the plaintiff." The several paragraphs of the complaint were founded upon alleged parol contracts between the plaintiff and the defendant, and it would doubtless have been proper for the court to have made an order on the plaintiff to state with what officer or agent

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of the defendant the contract was claimed to have been made. However, we do not think the judgment should be reversed on account of the refusal of the motion. It does not appear that the appellant was ignorant of the facts in this respect, or was surprised on the trial in reference thereto, or was harmed by the ruling in any way. If danger of surprise had been apprehended, and the appellant really desired the information asked for in her motion, she could have obtained it by an interrogatory addressed to the plaintiff.

There are numerous cases wherein this court has held that defects and uncertainties in a pleading which states facts sufficient can not be reached by a demurrer, but only by a motion to make certain, or to supply the defect; and, doubtless, there may be cases in which the judgment should be reversed on account of the refusal of the court to sustain such a motion, but not unless it be made to appear that the party has, or reasonably may be presumed to have, suffered harm from the adverse ruling. Sections of the code, 101, 580.

Judgment affirmed, with costs.

No. 9094.

THE STATE v. BERDETTA.

HIGHWAY.—Street.—Sidewalk.—A public street is a public highway, and a sidewalk is a part of the street, and public highways belong, from side to side and from end to end, to the public.

CRIMINAL LAW.—Statutory Offences.—Common Law.—In this State there are no common-law offences, and criminal prosecutions can only be maintained for offences prescribed by statute; but, where the statute does not specially define the offence, the common-law definition will be adopted.

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137	254
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145	279
73	185
153	538
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156	93
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SAME.—Nuisance.—Obstructing Highway.—What at common law was a public nuisance is such under the statute, and the permanent obstruction of a public highway is *per se* a public nuisance.

SAME.—Public Street.—Private Use.—There can be no rightful private permanent use of a public street or alley, and whoever so uses it commits an indictable nuisance.

SAME.—Municipal Corporation.—The right of an adjacent proprietor in and to the highway is one which the Legislature can not take away without compensation; nor can municipal corporations devote streets to private purposes.

SAME.—A municipal corporation is guilty of maintaining a public nuisance, if it places a permanent obstruction in a public street.

SAME.—Right of Property Owners in Street.—Injunction.—Indictment.—Evidence.—The permanent obstruction of a street is such an unlawful act as injures the property owners of the street, who have a right, as an essential incident to the enjoyment of their property, to the use of the street, in its full width, free from all obstructions of a permanent character; and this right may be vindicated either by injunction or indictment, and its violation established by evidence of a permanent encroachment upon the street.

SAME.—Where the unlawful act of obstructing a public highway injures others than those owning real estate upon the street, such act is of itself a public nuisance.

SAME.—Encroachment on Street Public Nuisance.—A permanent structure, materially encroaching upon a public street, in a thickly inhabited part of a large city, is a nuisance *per se*.

SAME.—Duty of Court to Give Instructions.—Hypothetical Case.—Practice.—While a jury in a criminal prosecution is not bound to follow the instructions given, yet it is nevertheless the duty of the court to instruct them upon the law applicable to the case; and where an instruction states hypothetically all the facts necessary to constitute an offence, it is proper for the court to give the rule of law applicable to such facts.

From the Marion Criminal Circuit Court.

J. B. Elam, Prosecuting Attorney, *J. M. Cropsey* and *C. M. Cooper*, for the State.

J. L. Mitchell, for appellee.

ELLIOTT, J.—This appeal is prosecuted by the State from a judgment acquitting the appellee of the offence of maintaining a public nuisance. The State seeks a review of the ruling of the court in refusing an instruction asked by the

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prosecuting attorney, and upon the question whether that ruling was correct or not the case turns.

The instruction asked by the State and refused by the court reads as follows : “If it is shown by the evidence beyond a reasonable doubt that Market street and the sidewalk thereof is situated in the city of Indianapolis, Marion county, Indiana, in a densely populated neighborhood, and constantly used by the citizens of said State for the purpose of passage and repassage as a public highway, and was so situated and used on the 12th day of May, 1880, and the defendant on that day was occupying and maintaining on said sidewalk a building of a permanent nature, of the length of twenty-three feet, and of the width of three feet eleven inches, and of the height of seven feet, and that said sidewalk was fifteen feet wide, except where said building was situated, and that where said building was situated but eleven feet remained for the passage of said citizens of said State, you should find the defendant guilty, such an obstruction of a public highway being a nuisance within itself.” Although this instruction was refused by the court, yet, upon its own motion, one was given precisely the same, except that the last clause was omitted, and the following clause substituted : “And that the obstruction essentially interfered with the comfortable enjoyment of said sidewalk.” The effect of this striking out and substitution was to very materially change the meaning and force of the instruction. The theory of the instruction, as originally written, is very different from that asserted by the instruction as framed by the court. The instruction asked by the prosecution asserts that it is sufficient for the State to prove the existence of a permanent obstruction in the highway, while that framed by the court affirms that it is not sufficient to show the existence of such an obstruction, but that the State must show, in addition, that “it essentially interfered with the comfortable enjoyment of the sidewalk.”

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A public street is a public highway, and a sidewalk is a part of the street. *The Common Council, etc., v. Croas*, 7 Ind. 9; *The State v. Mathis*, 21 Ind. 277. The common-law doctrine was that a public highway was a "way common and free to all the king's subjects to pass and repass at liberty," and that an unauthorized obstruction was indictable and punishable as a nuisance. Nor was it necessary to show anything more than that there was a permanent obstruction of the public way. *The People v. Vanderbilt*, 28 N. Y. 396; *The State v. Woodward*, 23 Vt. 92; *Davis v. Mayor, etc.*, 14 N. Y. 506, 524; *Commonwealth v. King*, 13 Met. 115; *Harrow v. The State*, 1 Greene, Iowa, 439.

Counsel for appellee argue with much force and ingenuity that the common-law doctrine does not prevail in Indiana, for the reason that our statute prescribes an essentially different rule. It is indeed true, as counsel assert, that we have no common-law offences, and that criminal prosecutions can only be maintained for such offences as are prescribed by statute. It does not, however, follow from this that there is no such thing as an indictable public nuisance under our statute. In *Burk v. The State*, 27 Ind. 430, it was held that there is such an offence, although the statute does not specifically define a public nuisance. In that case it was held that "The phrase 'public nuisance' had a very definite meaning in the law long before the statute was enacted." If the case cited should be followed to its logical consequences, it would require us to hold that what was at common law a public nuisance is such under our statute, and that permanently obstructing a highway is *per se* a public nuisance, because it was always such at common law. We hold this to be the correct ruling.

Upon the assumption of the appellee, that the State must show an unlawful act injurious to the citizens of the State, and one which essentially interferes with either the free use of property or the comfortable enjoyment of life or prop-

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erty, the conclusion which he deduces is an incorrect one. The permanent obstruction of a public street is in itself an unlawful act, essentially interfering with the free use of property, as well as the comfortable enjoyment of life. The right of adjacent proprietors in and to the highway is one of which the Legislature itself can not deprive them without compensation ; nor can the municipal authorities, broad and comprehensive as their powers are, devote the street to private purposes. *Haynes v. Thomas*, 7 Ind. 38 ; *St. Vincent O. Asylum v. City of Troy*, 32 Am. R. 286. So far does this rule go that the municipality is itself guilty of maintaining a public nuisance, if it place a permanent obstruction in a public street. *Wartman v. City of Philadelphia*, 33 Pa. St. 202 ; *The State v. Laverack*, 34 N. J. Law, 201. Even under the British form of government, the king had no power to authorize the permanent obstruction of a public highway. Vin. Abr., Tit. *Nuisance*. The existence of the permanent obstruction in the highway is, therefore, clearly such an unlawful act as injures the citizens who are lot-owners on the street, and who have a right, as an essential incident to the enjoyment of their property, to have the street maintained its full width, free from all obstructions of a permanent character. This is such a right as may be vindicated either by injunction or indictment, and its violation is established by evidence of a permanent encroachment upon the street. *Smith v. The State*, 3 Zab. 712 ; *Moyamensing v. Long*, 1 Pa. 143 ; Wood's Law of Nuisances, sec. 252 ; *Langsdale v. Bonton*, 12 Ind. 467. It is upon the doctrine here affirmed, that the case of *Pettis v. Johnson*, 56 Ind. 139, proceeds. There, this court held that a stairway erected upon a public alley of a city, by express authority of the municipal officers, was *per se* a public nuisance, which an adjacent proprietor might have abated. The same general doctrine is declared in the late and well-considered case of *Commonwealth v. Blaisdell*, 107 Mass. 234. The conclusion upon

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principle, as well as from authority, must be, that, if the unlawful act of obstructing a public highway did not injure others than those owning real estate upon the street, such unlawful act would be, of itself, a public nuisance.

Broader and more comprehensive rights than those of adjacent proprietors, as well as a far more numerous class of citizens than those owning lots abutting on the street, are, however, injuriously affected by the unlawful obstruction of a public highway. All the citizens are affected, for "a highway," to adopt one of the definitions found in the books, "is a road which every citizen has a right to use." The right to pass and repass upon a public highway is not restricted to any part, for "the public are entitled, not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveller." 1 Hawkins P. C., ch. 32, sec. 11; Angell Highways, sec. 226. The same doctrine is declared by this court in *The City of Indianapolis v. Gaston*, 58 Ind. 224, where it is held that the entire width of a sidewalk must be maintained convenient and safe for the use of travellers. In *Sherlock v. Bainbridge*, 41 Ind. 35, the same general principle is explicitly affirmed. The question, in all cases of the character of the present, is not whether travel was actually interfered with, but whether there was an unlawful encroachment upon a public street by the erection of a permanent obstruction.

The citizens of the municipality who are invested with the local government are all affected by the obstruction of a street, because all, in the capacity of taxpayers, are charged with the burden of so keeping the streets as that they may be used in safety by the citizens of the State. So far does the law upon this subject extend that, even though the obstruction be placed on the street by a wrong-doer, the municipality may, under some circumstances, be liable for any injuries which may be caused by such an obstruction. It can not be doubted that, in keeping the streets clear and free

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from obstructions, all the taxpayers of a municipality are interested, and, therefore, the obstruction of a street necessarily affects a very great number of the citizens of the State. In three different capacities, therefore, are the citizens affected by the permanent obstruction of a public street, as adjacent owners, as taxpayers, and as citizens, having a right to use all of the public sidewalk not in the actual use of some other traveller.

Upon the facts hypothetically stated in the instruction, the rule of law must be that the obstruction is *per se* a nuisance, or we might have on the same street, indeed on the same square, an obstruction pronounced by one jury to be a nuisance, and another, of the same character and dimensions, by another jury, declared not to be a nuisance. If any other rule than that insisted upon by the State is declared to be the law, then each particular case, although the facts should be identically the same, might be differently decided, the result in each case depending upon the peculiar views of the jury trying the cause. The only just and safe rule is, that a permanent structure, materially encroaching upon a public street, in a thickly inhabited part of a large city, is a nuisance of itself. There is no injustice in this rule, because no doctrine is more reasonable or more firmly settled than that the streets of a city are for the use of the public, and that no one can have a right to permanently divert a street, or any part of a street, to private purposes ; and one who does so divert a street ought not to be permitted to compel the State to show specifically that the enjoyment, life or property of some part of the citizens was essentially interfered with. The necessary consequence of the unlawful act is to essentially interfere with the enjoyment of life and property, and, this being so, it was the duty of the court to instruct the jury, as matter of law, that an obstruction of the character described in the State's instruction was, of itself, a nuisance. If it be the law as it unquestionably is, that an unlawful

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encroachment upon a public highway, by the erection of a structure of a permanent character, in a populous part of a large city, is an act injuriously affecting all the abutters, taxpayers, and, indeed, all citizens of the State, there is no reason for instructing that the State must supplement the evidence of the character and location of the obstruction with evidence showing that it interferes with the comfortable enjoyment of the sidewalk.

The character and location of the obstruction being shown, it was the duty of the court to have told the jury, as a matter of law, that such an obstruction was a public nuisance. Unless the conclusion from the existence of the facts be deemed and treated as matter of law, the result will be a line of cases with precisely the same facts, but with diverse judgments, varying with the views of the jury by which each case is tried. The rule which must guide is one of law, and should be declared by the court; and, as the rule of law was correctly expressed in the instruction asked, it should have been given.

The instruction given by the court was of such a character as to convey to a man of ordinary capacity an incorrect view of the law applicable to the case. As we have already shown, the rule at common law is, beyond all question, that a permanent and material encroachment upon a public street is *per se* a nuisance, and as we have further shown, our statute does not change that rule, it must be held error to so instruct the jury as to lead them to believe that, in addition to showing the character, situation and surroundings of the obstruction, it was necessary for the State to show that the comfortable enjoyment of the sidewalk was essentially interfered with. But one inference can be drawn from the instruction of the court, and that is that there must be some other facts shown in addition to those stated in the instruction. Having hypothetically stated all the facts which it was incumbent upon the State to prove, the last clause of the

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instruction, reading as follows: "and that said obstruction essentially interfered with the comfortable use of the sidewalk," is added, thus conveying to the jury the impression that something more than the facts recited in the instruction must be proved. If the facts stated in the part of the instruction preceding the clause just quoted were all that the State need prove, then, by adding that clause, an erroneous rule was declared, because that clause asserts that, in addition to the facts recited, the State must show some other fact or facts.

The distinction between the temporary occupancy of public streets for commercial or building purposes, and its permanent obstruction, is well illustrated in the leading case of *Wood v. Mears*, 12 Ind. 515. It is not doubted that sidewalks may, when authorized, be temporarily occupied for private purposes; but temporary occupancy for authorized private purposes is quite a different thing from the erection of a structure of a permanent character. But even with respect to temporary use of such streets, it must be borne in mind that it may go to the extent of becoming a public nuisance. *Rex v. Russell*, 6 East, 427; *Commonwealth v. Passmore*, 1 S. & R. 217; *Palmer v. Silverthorn*, 32 Pa. St. 65; *Commonwealth v. Milliman*, 13 S. & R. 403.

Appeal sustained, at costs of appellee.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—The importance of the questions involved, and the earnestness and ability with which the petition for a rehearing has been argued, have induced us to again carefully consider the questions which this case presents.

We are satisfied that the conclusions reached and announced in the original opinion are correct. Public highways belong, from side to side and end to end, to the public. If acquired under the right of eminent domain, the public

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money paid for them. If acquired by dedication, the donor gave them to the public for public purposes. The right to seize lands, under the right of eminent domain, extends only to cases where the highway is for the public use. *Blackman v. Halves*, 72 Ind. 515. There is no such thing as a rightful private permanent use of public highways. If one person can permanently use the highway for his private business purposes, so may all. Once the right is granted, there can be no distinction made, no line drawn ; all persons may build their shops, exhibit and sell their wares, within the boundaries of the public highway. There is no right in any person to permanently appropriate to private use any part of a public street or alley. The person who so uses a public highway commits an indictable public nuisance. An English author of deservedly high repute illustrates the doctrine we are endeavoring to enforce, thus: "In the case of an ordinary highway running between fences, the right of way or passage is *prima facie*, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the whole of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and passengers. It is an indictable offence, therefore, to place posts on greensward and open places extending between the metalled part of the road and the fence, dividing the road from the adjoining land, although the posts do not in point of fact offer any injurious obstruction to the public traffic. It is enough that they stand in the way of those who may wish to traverse the whole space between the fences." 1 Addison Torts, p. 328, sec. 313.

In *Commonwealth v. Wentworth*, 1 Brightly N. P. 318, the facts were precisely similar to those stated in the instructions asked by the State in the case in hand, and the court, as matter of law, declared the act of placing a fruit-stand upon the sidewalk of a city to be a public nuisance.

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The accurate and learned editor of the Albany Law Journal declares that "There is nothing novel in the doctrine that the citizens have a right to a clear sidewalk," and that fruit-stands, even when placed thereon by authority of the municipal legislatures, are nuisances.

We deem it unnecessary to add other citations to those made in the original opinion, although many more might be added.

There was no usurpation of the functions of the jury in the instruction asked by the State. Matters of fact are always to be decided by the jury, but, when the facts are entirely undisputed, it is the duty of the court to state to the jury the law upon the facts. This is true in criminal prosecutions as well as civil actions. The statute makes it the imperative duty of the court to instruct the jury upon all matters of law in criminal prosecutions, and if, in giving instructions, an error is committed, the case will be reversed. It is none the less the duty of the court to instruct the jury upon the law, because the jury are the ultimate and exclusive judges of both the law and the facts. The jury are not, according to the settled rule of this State, bound to obey the instructions given them, but the court is nevertheless bound to inform them upon all matters of law. In this case, the facts hypothetically stated in the instruction were all that were required to constitute a public nuisance. Not a single material fact was wanting, and it was proper to state the rule of law applicable to such facts. Courts are not to state mere abstract propositions of law, but to state rules applying to the particular case on trial. In this case the right of the public, the invasion of that right by the wrongful act of the appellee, and the injury to the public, all appeared in the hypothetical statement made by the court, and nothing remained but to do as the State asked the court to do—declare the rule of law applicable to such a state of facts.

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Appellee refers us to the case of *The State v. Johnson*, 69 Ind. 85, where it was held that an indictment attempting to charge the offence of living together in open and notorious fornication was bad because it did not aver that the living together in fornication was open and notorious. The doctrine of that case we heartily approve, but fail to see that it has the slightest application to the case we have in hand. We are also referred to the case of *The State v. Houck*, ante, p. 37. It was there held that an information which charged that a slaughter-house that was so maintained as to emit offensive and noisome stench and smells around it for the distance of one-fourth of a mile, was bad for the reason that it did not aver that there were persons living within that distance. It was there said: "Nor does it appear, by the affidavit, that any one resided within the limits of the quarter of a mile, to which extent the air was contaminated. * * * *"

In short, no facts are stated to show that any part of the citizens of the State were injured. The general conclusion, 'to the great injury, annoyance and common nuisance of all the citizens of the State,' etc., does not supply the defect in the main body of the allegation." That case, so far from being in appellee's favor, is against him, for it decides that the facts, and not the mere conclusions, are to control. In the case in hand, all the material facts appear, and the court was asked to declare the law upon these undisputed facts.

The only other case to which counsel refer is the overruled case of *Hackney v. The State*, 8 Ind. 494. All we need say of that case is, that the doctrine which it declared has been completely exploded. *Wall v. The State*, 23 Ind. 150; *Burk v. The State*, 27 Ind. 430; *The Ohio, etc., R. W. Co. v. Simon*, 40 Ind. 278; *Pettis v. Johnson*, 56 Ind. 139; *Hood v. The State*, 56 Ind. 263; *Haag v. The Board, etc.*, 60 Ind. 511. Many of these cases, and more that might be cited, hold that, under our statute, a nuisance is substantially the same as at common law. The law upon

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this subject is well stated by FRAZER, J., in *Burk v. The State, supra*. It was there said: "There is no difficulty in understanding the section of the statute upon which this prosecution was founded. The phrase 'public nuisance' had a very definite meaning in the law long before the statute was enacted. To annex a definition of each word employed in the section was certainly never within the purpose of the Legislature. Such absurdity is not to be imputed to the law-making power. Was it then intended that in creating a crime, words having a comprehensive and exact legal meaning, embracing much in brief, must not be employed; that the virtue of such legislation should depend upon the vastness of its circumlocution? It is hardly conceivable that anything more was intended than that there should be no criminal prosecution in this State for any act, unless the Legislature had first declared it a crime, in intelligible terms, and fixed the punishment therefor. In that sense, the enactment against public nuisances is consistent with it. It defines—i. e. marks out, with distinctness, a public nuisance as a crime."

Much is said by counsel about the necessity of supplementing the facts stated in the instruction by evidence that some injury was done to some particular citizen or citizens. It is evident that counsel lose sight entirely of the principle which governs this case. Although at the expense of some repetition, we restate this principle. The public were entitled to the free use of every part of the sidewalk, and the erection of a permanent structure thereon was an invasion of this right, constituting a legal injury affecting not only some, but all, of the citizens of the State. The act is itself a wrong, and in and of itself a wrong to all the citizens of the commonwealth. There is no need to call this or that citizen and ask him whether he has suffered any annoyance. This would be impracticable as well as needless, because the act itself affects all who have a right to travel

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the highway, and that right belongs to everybody in the State. It is impossible to invade it without affecting the interests of all.

We are told that numerous encroachments have been made upon public sidewalks by stairways, basement railings and the like, under the belief that such encroachments are not nuisances *per se*. We can not say what belief persons may act upon in appropriating public property, but we can say that there can be no reasonable foundation for a belief that one may seize upon the property of another and appropriate it to his own use, even though that other be the public. There is not the semblance of a ground upon which to found such a belief. Men certainly know that they do not own an inch of the public way, and know, too, that the way belongs to the public, and is free and common as a way to every citizen of the land. Surely, no man can justly claim that he can seize the public sidewalks of a large city, and build thereon permanent structures for private use. But more than this, he who does seize a part of the public highway for private purposes knows—not merely as matter of law, and that is conclusive knowledge, but as matter of fact—that he is invading the rights of all the citizens of the State; for all have a right to the free use of every part of the highway.

Petition overruled.

 No. 7199.

WOOLLEN v. WHITACRE.

PROMISSORY NOTE.—*Payable in Bank.*—*Fraud in procuring Signature.*—*Innocent Holder.*—Where a note is executed payable at a bank in this State, on the false and fraudulent representations of the payee,

73	198
124	590

73	198
131	401

73	198
163	886

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the maker believing it to be an instrument of a different character, such maker is liable for the amount of such note in the hands of an innocent endorsee, before maturity, and for value.

SAME.—Pleading.—Answer.—Contract.—A contract can not be confessed and avoided, and also denied, in the same paragraph of answer.

SAME.—Unverified Answer in Denial.—In an action by an endorsee on a promissory note, where proof of the matters alleged in an answer would not avoid such note in the hands of a *bona fide* holder, such answer is insufficient on demurrer; and a plea denying the execution of the note, not verified, imposes no other burden on the plaintiff than to produce and give in evidence such note.

SAME.—Evidence.—Under an unverified answer in denial, evidence that the note in suit is a forgery, or was not executed by the defendant, is inadmissible.

From the Huntington Circuit Court.

W. H. Trammel and *W. W. Woollen*, for appellant.

L. P. Milligan and *A. Moore*, for appellee.

WORDEN, J.—This was an action by the appellant, as the *bona fide* holder for value, by endorsement before maturity, against the appellee as the maker, of a promissory note for the sum of \$400, dated February 9th, 1872, and payable six months from the date thereof, to the order of James B. Drake, at the First National Bank at Indianapolis.

The defendant answered in three paragraphs. The first was as follows :

“The defendant, Price S. Whitacre, for answer to plaintiff’s complaint, says that he never executed or delivered the supposed promissory note, sued upon by plaintiff, in manner and form as sued upon in his complaint, and that it is not the note of this defendant.”

The second and third paragraphs were much alike, the third being more lengthy, and setting up the supposed defence more in detail than the second, but containing no material allegations not found in the second. The third paragraph need not, therefore, be set out. The second was as follows :

“And the defendant, Whitacre, for a further answer to

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plaintiff's complaint, says: That on the 9th day of February, 1872, two persons to this affiant unknown, came to defendant, at his farm and residence thereon, four miles from the nearest town, and one of said persons represented himself to be the duly constituted agent of one J. B. Drake, to sell a certain patent right and territory therefor, for 'J. B. Drake's Horse Hay Fork and Hay Carrier;' that, then and there, such pretended agent constituted this defendant agent to sell the same for three townships in said county; that the terms of said agency were mutually agreed upon and embodied in a contract, which this defendant then and there executed and delivered to said pretended agent; that said contract of agency is in the possession of some person unknown and can not be herein set out; but that said contract was so artfully constructed, that its terms, when read properly, contained the contract as aforesaid; but affiant believes it contained a promissory note, secretly and artfully concealed therein, which note could only be constructed by mutilating, cutting and trimming and severing said note out of said contract; that, when such contract was entire, it was executed by this defendant; but, after it was so executed and delivered in such form, it was mutilated, changed, altered, severed and otherwise trimmed into the note sued upon in plaintiff's complaint, all of which mutilation was done without the knowledge, consent, connivance or instance and request of this defendant. Wherefore defendant says that such pretended note is not his act and note, and was never executed by him as such, in manner and form as sued upon.

“Wherefore defendant asks judgment for costs and all proper relief.”

The second paragraph only was verified.

The plaintiff demurred to the first, second and third paragraphs respectively; but the demurrers were overruled, and the plaintiff excepted, and such further proceedings were

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had as that judgment was rendered for the defendant. Error is assigned upon the ruling on the demurrers.

Neither the second nor third paragraph of answer controverts the execution of the note. They are not answers of denial, but of confession and avoidance. They do not put in issue the execution of the note, but set up new matter intended to show that it is invalid. The second paragraph, after setting up the new matter, concludes that, "Wherefore defendant says that said pretended note is not his act and note, and was never executed by him *as such*, in manner and form as sued upon." The meaning of which is, that by reason of the new matter thus set up, which does not deny the execution of the note, but seeks to avoid it, it is not the defendant's note, not being executed by him as such. This can not be construed as a denial by the defendant of the execution of the note. A contract can not be confessed and avoided, and also denied, in the same paragraph of answer. *Cronk v. Cole*, 10 Ind. 485; *Kimble v. Christie*, 55 Ind. 140. We do not think the defendant could be convicted of perjury, this paragraph being verified, by proof that he executed the note. This would furnish a fair test of the construction of the pleading.

The second and third paragraphs not putting in issue the execution of the note, it remains to inquire whether they set up facts sufficient to avoid it in the hands of an innocent holder. That they do not is settled by many cases decided by this court, wherein like questions have been involved.

Questions have been so often decided by this court as to the rights of *bona fide* endorsees of commercial paper, executed under circumstances similar to those set up in the paragraphs in question, that we deem it unnecessary here to enter upon any further discussion of the subject. We refer, however, to some of the cases upon the point: *Nebeker v. Cutsinger*, 48 Ind. 436; *Kimble v. Christie*, *supra*; *Cor-*

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nell v. Nebeker, 58 Ind. 425; *Ruddell v. Fhalor*, 72 Ind. 533, and cases there cited.

The court erred in overruling the demurrer to the second and third paragraphs of answer. We can, by no means, say that the error was harmless. Proof of the matters alleged in the paragraphs would not avoid the note in the hands of a *bona fide* holder; and, while the first paragraph may be good as a pleading denying the execution of the note, yet, as it was not verified, it could impose no other burden upon the plaintiff than to produce and give in evidence the note. Under the unverified paragraph in denial, the defendant could not give evidence that the note was a forgery, or was not executed by him. 2 R. S. 1876, p. 75, sec. 80; *Unthank v. The Henry County Turnpike Co.*, 6 Ind. 125; *Hunt v. Raymond*, 11 Ind. 215; *Denny v. The North Western Christian University*, 16 Ind. 220; *Evans v. The Southern Turnpike Co.*, 18 Ind. 101; *Coen v. Funk*, 18 Ind. 345. There are, doubtless, other cases to the same effect scattered through our reports, but it is unnecessary to make any further collection of them here.

The judgment below is reversed, with costs, and the cause remanded with instructions to the court below to sustain the demurrers to the second and third paragraphs of answer.

No. 5873.

JEFFRIES v. LAMB ET AL.

PROMISSORY NOTE.—*Surety.*—*Failure of Consideration.*—*Contract.*—

Where the payee of a note induces another to become surety thereon, by agreeing that he would deliver to the maker a previous note and chattel mortgage for cancellation, so that such surety might indemnify himself by obtaining a first mortgage on the property mortgaged, a

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failure and refusal to comply with such agreement constitute a failure of consideration as between such payee and surety.

SAME.—*Payment.*—A promissory note not payable at a bank, and not governed by the law merchant, given for a precedent debt, will not operate, unless by express agreement, as a payment or extinguishment of such debt.

From the Whitley Circuit Court.

W. Olds, for appellant.

T. R. Marshall and *W. F. McNaghy*, for appellees.

Howk, J.—In this action the appellant sued the appellees upon a promissory note, of which the following is a copy:

“\$228.50. COLUMBIA CITY, IND., August 1st, 1874.

“On or before the first day of April, 1875, we promise to pay to the order of Mortimore Jeffries two hundred twenty-eight and $\frac{5}{100}$ dollars, payable at Columbia City, Indiana, value received, without any relief from valuation and appraisement laws, with interest annually at ten per cent. until paid, and all costs and attorney’s fees for collection of said note, if not paid at maturity.

(Signed)

“HARRISON HUPP,

“C. W. LAMB,

“HENRY BROWN.”

A judgment by default was duly rendered against the defendant Casper W. Lamb, for the amount due on the note.

The appellees Harrison Hupp and Henry Brown jointly answered in a single paragraph, to which the appellant’s demurrer, for the alleged want of sufficient facts therein, was overruled by the court, and to this decision he excepted. He then replied to said answer by a general denial; and a trial by the court of the issues thus joined resulted in a finding and judgment against him, in favor of said appellees, for their costs.

Did the court err in overruling the appellant’s demurrer to the answer of the appellees Hupp and Brown? This is

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the only question properly presented for the decision of this court, by the appellant's assignment of error.

In their answer, the said Hupp and Brown, admitting the execution of the note in suit, and that it was due and unpaid, alleged, in substance, that the same was executed by them solely as sureties for their co-defendant Lamb, and in no other or different character or capacity, and for no other or different consideration moving to them whatever ; that, at the time of the execution of said note, the said Lamb was indebted to the appellant in the amount for which the note was given, evidenced by another note theretofore executed by him to the appellant, on the 2d day of February, 1874, for the sum of \$220, with interest ; that the last mentioned note was secured by a chattel mortgage, of even date therewith, duly recorded in the recorder's office of Whitley county, within ten days from the day of its execution, which said mortgage was given by said Lamb upon a stud-horse, or stallion, described therein as being known by the name of "Thom. H. Clinton," about 17 hands high, with a small star in the face, and then and since owned by said Lamb, and of the value of \$250 ; that, at the time of the execution of the note in suit, it had been and was agreed upon, by and between the appellant and said Lamb, Hupp and Brown, that, in consideration of the execution of the note sued on, and of its execution by said Hupp and Brown as such sureties, the said note for \$220, and said chattel mortgage, should be delivered up, either to said Lamb or to said Hupp or Brown, to be cancelled, and that the said Lamb should execute a mortgage to said Hupp and Brown, upon the same horse, to indemnify them against any liability upon said note for \$228.50, which note was delivered to the appellant upon this express understanding and agreement ; that, at the time of the delivery of the last mentioned note, being the note now in suit, the said note for \$220, and the mortgage to secure it, were not delivered up, for the reason that the appel-

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lant did not have them with him, but he agreed to surrender the same as soon as he could obtain the same from his house in Smith township, in said county, where they then were, in order that said Hupp and Brown might have the benefit of the security so being given them by mortgage upon the same property; that said mortgage was so executed to them by said Lamb on the day and at the time of the execution of said note by them to the appellant, being the 21st day of August, 1874, the said note being, at the appellant's instance, antedated August 1st, 1874; and that the said last mentioned mortgage was duly recorded in the recorder's office of said Whitley county.

And the appellees Hupp and Brown averred that, after the delivery of the note in suit to the appellant, he failed and refused, and had since refused, to comply with said agreement on his part, as to delivering up the note and mortgage given him by said Lamb, and insisted that he was entitled to hold the same, and to the benefit of said mortgage; and that, by means of the premises, there had been a breach of the condition, and a failure of the consideration, on which said note was executed by said appellees. Wherefore they demanded judgment, that the note in suit be declared null and void as to them, and that the same be cancelled.

We are of the opinion that the court committed no error in overruling the appellant's demurrer to the appellees' answer. The facts alleged therein, if true, and the demurrer concedes their truth, show very clearly that the appellees Hupp and Brown became the sureties of their co-defendant, Lamb, in the note in suit, upon the faith of the appellant's agreement with them, that if they would become such sureties, he would surrender Lamb's previous note and the chattel mortgage securing the same, to be cancelled, so that they might indemnify themselves from their liability as such sureties, by procuring from Lamb a first mortgage on the same chattel property. The answer further shows that the appel-

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lant had failed and refused to surrender the said note and chattel mortgage, to be cancelled, in compliance with his said agreement, upon the faith of which the said Hupp and Brown had become the sureties of Lamb in the note sued upon. These facts show, we think, an entire failure of the consideration of the note in suit, as between the appellant as payee of the note, and said Hupp and Brown as the sureties therein.

The appellant's counsel claims, as we understand his position, that the answer was bad, on the demurrer thereto for the want of facts, because the facts stated therein were sufficient to show that Lamb's first note was paid by the note in suit, and the payment of said first note was, in legal effect, a satisfaction of the chattel mortgage, which was only an incident of the note it was given to secure. The law of this State may be regarded as settled, we think, by an unbroken line of the decisions of this court, that a promissory note not payable at a bank in this State, and not governed by the law merchant, such as the note in suit in the case at bar, though given for a precedent debt, will not operate as a payment or in extinguishment of the precedent debt, in the absence of an express agreement by and between the parties that it should so operate. *Hill v. Sleeper*, 58 Ind. 221; *The Bristol Milling, etc., Co. v. Probasco*, 64 Ind. 406; *Lindeman v. Rosenfield*, 67 Ind. 246.

In the case now before us, there was not only the absence of an express agreement that the note sued upon should operate as a payment, or in extinguishment, of Lamb's prior note, as the case is presented in this court, but it affirmatively appeared in the answer, the sufficiency of which is the only subject of consideration, that the appellant insisted that he was entitled to hold Lamb's prior note and to the benefit of the chattel mortgage securing said note.

It is claimed, also, that the answer was insufficient, because the facts stated therein showed that the appellees as

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sureties could by suit enforce the appellant's agreement, and compel him to surrender the prior note and chattel mortgage for cancellation. It may be true, as claimed, that a court of justice would have compelled the appellant, in a suit for that purpose, to keep good faith with the appellees as sureties; but surely, under the facts stated in their answer, where the only consideration for their contract of suretyship, as between them and the appellant, the payee of the note in suit, was his plighted faith and agreement, neither law nor equity would require that the appellees, as sureties, must bring a suit against the appellant to compel the surrender, for cancellation, of the prior note and mortgage in accordance with his agreement. It seems to us that the appellant's failure and refusal to comply with his agreement, upon the faith of which the said Hupp and Brown were induced to become sureties on the note now in suit, as stated in their answer, were sufficient to show an entire failure of the consideration of the said note, as between them and the appellant. There was no surrender of the prior note and mortgage for cancellation, according to the contract; and therefore there was no consideration to support the appellees' contract of suretyship, in the note in suit. *Armstrong v. Cook*, 30 Ind. 22; *Heeg v. Weigand*, 33 Ind. 289.

Some minor objections have been pointed out, by the appellant's counsel, to the sufficiency of the answer, but they seem to us to have been the proper subjects possibly of motions to make more specific. They were not reached by the demurrer to the answer, and we do not consider them. The demurrer to the answer was, we think, correctly overruled.

The judgment is affirmed, at the appellant's costs.

NOTE.—The appellant having died since the submission of this cause, the judgment of this court is rendered as of the May term, 1878, the date of such submission.

Moran v. The State, *ex rel.* Walker.

No. 6727.

MORAN v. THE STATE, EX REL. WALKER.

73 208
156 199

BASTARDY.—*Marriage.*—A child begotten before, but born after, the marriage of its parents, is not a bastard.

SAME.—*Answer.—Demurrer.*—In a prosecution for bastardy, where the child has not been born, an answer setting up the marriage of the defendant with the relatrix is sufficient on demurrer.

From the Perry Circuit Court.

C. H. Mason, for appellant.

D. P. Baldwin, Attorney General, and *G. L. Reinhard*, Prosecuting Attorney, for the State.

NIBLACK, C. J.—The State, on the relation of Emily Walker, made complaint before a justice of the peace against Samuel Moran for bastardy, alleging that the said Emily was pregnant with a child which, if born alive, would be a bastard, and that the said Moran was the father of said child. The justice, upon a hearing, recognized Moran to appear in the circuit court and answer to the charge thus preferred against him. Afterward the said Emily filed in the circuit court a paper, signed by her, stating that since the commencement of the action she had intermarried with the defendant, and that she thereby dismissed all further proceedings against him.

At the next term of court, the attorneys for the relatrix, for some reason not disclosed by the record, resisted a dismissal of the action, and the court refused to dismiss it.

The defendant then answered in two paragraphs :

1. In general denial.
2. That the defendant was the lawful husband of the relatrix, and that, in consequence, she was not entitled to prosecute the action against him.

A demurrer was sustained to the second paragraph of the answer, and, upon a trial of the cause, the defendant was adjudged to be the father of the child, of which the relatrix was then still pregnant, and ordered to pay the costs of the

Ginz v. Stumph et al.

prosecution, and to stand committed to the jail of the county until the costs were paid or replevied.

In the case of *Doyle v. The State*, 61 Ind. 824, it was, upon full consideration, held that a child begotten before, but born after, the marriage of its parents, is not a bastard. To a charge of bastardy, therefore, where the child has not been born, it is a sufficient answer to set up the marriage of the defendant with the relatrix.

The second paragraph of the answer might have been much improved by a motion to have it made more certain and specific, but it was substantially sufficient, and the court erred in sustaining a demurrer to it.

The judgment is reversed, at the costs of the relatrix, and the cause remanded for further proceedings.

No. 7483.

GINZ v. STUMPH ET AL.

ASSIGNMENT.—Stock.—Building Association.—An assignment of stock in a building association may be shown to have been for the purpose of collateral security merely, though made, and even if required by the rules of such association to be made, absolute in terms.

From the Marion Superior Court.

J. S. Reed, I. Klingensmith, C. Coulon and C. J. Coulon, for appellant.

R. B. Duncan, C. W. Smith and J. S. Duncan, for appellees.

WOODS, J.—The appellees recovered judgment against the appellant upon a promissory note, and upon appeal to the general term the judgment of the special term was affirmed. The only contention is, whether the finding and

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judgment is according to the law and the evidence of the case; and, made more narrow still, the dispute is whether the assignment of two shares of stock in a building association, made by the appellant to the appellees, was made absolutely and in payment of the note, or only as a collateral security for the payment thereof. There is ample evidence in the record on both sides of this question, and that being so, it is settled by cases too numerous and common to justify citation, that this court can not review or reverse the action of the court which tried the case. The fact that the assignment was absolute in terms did not conclude the question, and notwithstanding the declaration of the officers of the association, that the stock could not be assigned as a security or collateral, it was competent for the parties to make a transfer for such purpose; though made, and even if required by the rules of the association to be made, in absolute form.

Judgment affirmed, with costs.

No. 7760.

DENNERLINE ET AL. *v.* GABLE ET AL.

INSTRUCTIONS.—*Practice.*—*Record.*—*Supreme Court.*—Instructions given by the court of its own motion must be signed by the judge or embodied in a bill of exceptions, to form a part of the record on appeal to the Supreme Court.

SAME.—*Evidence.*—*Presumption.*—Where an instruction asserts a correct proposition of law, the Supreme Court, in the absence of the evidence, will presume such instruction to have been properly given.

From the Dearborn Circuit Court.

H. D. McMullen and *D. T. Downey*, for appellants.

J. A. Parks and *W. S. Holman*, for appellees.

Scanlan v. Ayres.

ELLIOTT, J.—The appellants ask a reversal upon the ground that the trial court gave the jury an erroneous instruction. The only ruling discussed in counsel's brief is that based upon the third instruction, which counsel say was given by the court upon its own motion.

What in form appear to be instructions are copied into the record, but they are not incorporated in a bill of exceptions, nor are they signed by the judge. Appellees insist that the instructions are not properly in the record. The appellees are right. It is settled that instructions given by the court upon its own motion must be signed by the judge, or brought into the record by a bill of exceptions. *Etter v. Armstrong*, 46 Ind. 197; *The Jeffersonville, etc., R. R. Co. v. Cox*, 37 Ind. 325; *Sibbitt v. Stryker*, 62 Ind. 41.

If the instructions were in the record, we could not consider the question argued by counsel, for the reason that the evidence is not before us. In the absence of the evidence, we must presume the instruction to have been properly given, for it asserts a proposition of law which is not in itself erroneous, but which, upon a proper state of facts, might be entirely relevant and proper.

Judgment affirmed.

No. 7424.

SCANLAN v. AYRES.

BILL OF EXCEPTIONS.—*Record.*—Where a bill of exceptions is not filed within the time granted by the court, it is not a part of the record.

From the Shelby Circuit Court.

S. Major and *A. Major*, for appellant.

T. B. Adams and *L. T. Michener*, for appellee.

Woollen v. Wise.

WOODS, J.—The error assigned is the overruling of the motion for a new trial, which was asked solely on the ground that the finding and judgment of the court were not sustained by sufficient evidence, and were contrary to law. The bill of exceptions, purporting to show the evidence, was not filed within the time granted by the court therefor, and is, therefore, not a part of the record.

Judgment affirmed, with costs.

No. 7198.

WOOLLEN v. WISE.

From the Huntington Circuit Court.

W. H. Trammel and W. W. Woollen, for appellant.
H. B. Saylor and J. B. Kenner, for appellee.

WORDEN, J.—This case is much like that of *Woollen v. Whitacre*, ante, p. 198; and that of *Ruddell v. Fhalor*, 72 Ind. 533, and, on grounds stated in those cases, the judgment below must be reversed.

The judgment below is reversed, with costs, and the cause remanded with instructions to the court below to sustain the demurrer to the first and second paragraphs of answer.

END OF NOVEMBER TERM, 1880.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1881, IN THE SIXTY-FIFTH
YEAR OF THE STATE.

No. 6744.

**THE BALTIMORE, OHIO AND CHICAGO R. R. Co. v. THE
BOARD OF COMMISSIONERS OF ST. JOSEPH COUNTY.**

73	213
136	505
73	213
150	571

APPEAL.—Board of Commissioners.—Town.—Incorporation of.—Under the act for the incorporation of towns, 1 R. S. 1876, p. 874, no appeal can be taken to the circuit court from an order of the board of commissioners incorporating a town.

SAME.—Cases Modified.—Under section 31 of the act in relation to county boards, 1 R. S. 1876, p. 357, an appeal may be taken to the circuit court by any person aggrieved, from all decisions of the board of commissioners, *except* in cases or proceedings where an appeal is expressly denied, or where an appeal is impliedly denied by force of a provision in the statute under which the particular case or proceeding may be had, that the order or decision of such board shall be final or conclusive. *Allen v. Hostetter*, 16 Ind. 15, and *Hanna v. The Board, etc., of Putnam County*, 29 Ind. 170, modified on this point.

From the St. Joseph Circuit Court.

J. T. Dye, A. C. Harris and A. Anderson, for appellant.

L. Hubbard, for appellee.

B., O. and C. R. R. Co. v. The Board of Com'rs of St. Joseph County.

Howk, C. J.—On the 5th day of March, 1877, one William A. Dailey and one hundred other persons, who claimed to be more than one-third of the legal voters within certain territory, described by metes and bounds, filed their petition to the board of commissioners of St. Joseph county, in the office of the county auditor, in which petition they prayed the said board of commissioners to appoint a time for an election at which the sense of the legal voters might be taken by ballot, as to whether the territory described should be a corporate town, under the name of Walkerton. Such proceedings were had in the matter of said petition, as that afterward, on the 8th day of June, 1877, an order was made by said board of commissioners incorporating the said town of Walkerton.

On the 2d day of July, 1877, the Baltimore, Ohio and Chicago Railroad Company, upon an affidavit and bond then filed, appealed from said order of the board of commissioners to the circuit court of said county. The appellee moved the court below to dismiss said appeal for the want of jurisdiction; which motion was sustained by the court, and to this ruling the appellant excepted and has appealed therefrom to this court.

From the foregoing statement of this case, it will be readily seen that a single question is thereby presented for the decision of this court, which may be thus stated: Will an appeal lie from an order of the board of commissioners incorporating a town to the circuit court of the county? The proceedings and order of the appellee for the incorporation of the town of Walkerton were manifestly had and held under and in conformity with the provisions of "An act for the incorporation of towns, defining their powers, providing for the election of the officers thereof, and declaring their duties," approved June 11th, 1852, and of the various acts, since passed, amendatory thereof. 1 R. S. 1876, p. 874. Neither in the original act, nor in any of the said amenda-

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tory acts, is there any provision whatever for an appeal from an order of the county board for the incorporation of a town. Not only so, but in section 9 of the original act it is expressly declared that the order of the county board for the incorporation of a town "shall be conclusive of such incorporation." 1 R. S. 1876, p. 875.

The question for decision is not a new one in this court, for it has been repeatedly decided, in cases where special proceedings were authorized by statute before the board of commissioners for specific purposes, and where the action of the county board was declared to be conclusive, and no provision made for any appeal therefrom, that the decision of the board will be final, and that no appeal will lie from such decision to any other court or tribunal.

Thus, in *Allen v. Hostetter*, 16 Ind. 15, it was held by this court, that "The general statute upon the subject of appeals was enacted in view of ordinary civil proceedings, and does not embrace proceedings under special acts; and hence no appeal will lie from the decision of the county board on a petition for the formation of a new county." In *Hanna v. The Board, etc., of Putnam County*, 29 Ind. 170, the case last cited of *Allen v. Hostetter, supra*, was criticised and doubted, though not expressly overruled. In the later case, the court quoted that part of section 31 of "An act providing for the organization of county boards, and prescribing some of their powers and duties," approved June 17th, 1852, 1 R. S. 1876, p. 357, wherein it is declared, that "From all decisions of such commissioners there shall be allowed an appeal to the circuit or common pleas court, by any person aggrieved," and commented thereon as follows: "It will be observed that while the act does not in terms purport to prescribe all the powers possessed by the board of county commissioners it does in express words authorize an appeal from all decisions they may make. The right of appeal is not limited to the decisions made by virtue of that

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act, but is expressly extended to all decisions; and when, therefore, jurisdiction already existed, or a new power was conferred by a subsequent statute, unless in the act granting the power an appeal is denied, the decision is subject to review in a higher court."

It will be readily seen, we think, that these two cases lay down rules or criteria, widely differing each from the other, for the determination of the vexed question as to whether an appeal will or will not lie from the decisions of the board of county commissioners to the circuit court of the county, in cases where the statute authorizing and governing the particular proceeding does not in terms provide for such appeal. Doubtless some confusion exists in the decisions of this court, following in the lines of the cases cited, upon the point now under consideration. We can not approve or follow the doctrine of either of the two cases, without material modification. We recognize the force of the general and comprehensive language used in section 31 of the act providing for the organization of county boards, to the effect that from *all* decisions of such county boards appeals should be allowed to the proper circuit court, by the parties aggrieved. Under this statutory provision, broad enough certainly in its scope and meaning to embrace any and all decisions in any and all proceedings before the county boards, it will not do to say, we think, as was virtually said in *Allen v. Hostetter, supra*, that appeals were thereby authorized only in ordinary civil proceedings, and not in proceedings under special acts.

We are of the opinion, also, that the doctrine enunciated in the case of *Hanna v. The Board, etc., of Putnam County, supra*, to the effect that, under the provisions of said section 31 of the act providing for the organization of county boards, appeals will lie from any and all the decisions of such boards, in any and all proceedings had before them, to the proper circuit court, by the parties aggrieved, unless the right

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of appeal is expressly denied in the statute authorizing the particular proceeding, is stated too broadly and must be modified. Of course, whenever the statute which confers jurisdiction on the board of commissioners, to hear and decide any matter or question, expressly provides that no appeal shall be allowed or taken from the decision of such board to any higher court, that provision makes the decision final, and no appeal will lie therefrom. But the statutes which confer on boards of county commissioners the jurisdiction and authority to hear and determine certain matters very frequently provide that the order and decision of the county board shall be final or conclusive of the question heard, while they contain no express provision denying an appeal to a higher court. In such cases, it has been repeatedly decided by this court, that an appeal would not lie from the order or decision of the county board to the circuit court of the county.

Thus, under sections 85 and 86 of the general law for the incorporation of cities, proceedings are authorized before the board of commissioners of the county in which the city lies, to hear and decide whether or not contiguous territory, not laid off into lots, shall be annexed to the city without the owner's consent. The statute does not, in terms, either authorize or deny an appeal by an aggrieved party to a higher court in such a proceeding, but it provides that the order of the county board for the annexation of territory "shall be conclusive evidence of such annexation in all courts in this State." In construing these provisions of the general law for the incorporation of cities, it has been uniformly held by this court, so far as we are advised, that an appeal would not lie from an order of the county board, for the annexation of contiguous territory to a city, by any aggrieved party, to a higher court. *The City of Indianapolis v. Sturm*, 39 Ind. 159; *Stilz v. The City of Indianapolis*, 55 Ind. 515; *The City of Peru v. Bearss*, 55 Ind. 576; *Windman v. The City of Vincennes*, 58 Ind. 480.

So, also, it has been decided by this court, in *The Trus-*

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tees of the Town of Princeton v. Manck, 35 Ind. 51, that, under sections 51 and 52 of the general law for the incorporation of towns, providing for the annexation of contiguous territory to incorporated towns, in and by proceedings before the board of county commissioners for that purpose, an appeal would not lie from an order of such board annexing such territory, in favor of an aggrieved party, to any higher court. In that case, the statute was silent on the subject of an appeal to any other court, but it declared that the order of the board, or an attested copy thereof, "shall be conclusive evidence in all courts, of such annexation." To the same effect are the following cases: *Church v. The Town of Knightstown*, 35 Ind. 177; *The Town of Cicero v. Sanders*, 62 Ind. 208.

For the reasons given, we are of the opinion that the rule regulating appeals from the decisions of the board of commissioners to a higher court, as declared by this court in *Hanna v. The Board, etc., of Putnam Co., supra*, must be so far modified as that it will provide for appeals from all decisions of the boards of county commissioners, *except* in cases or proceedings where an appeal is expressly denied, or where such an appeal is impliedly denied by force of a provision, that the order or decision of the county board shall be final or conclusive, in the statute under which the particular case or proceeding may be authorized and had. It is manifest, we think, that, in the case at bar, an appeal from the decision of the county board, incorporating the town of Walkerton, was and is impliedly denied under, and by force of, the statutory provision before referred to, that the order of the county board, in such a proceeding, "shall be conclusive of such incorporation." It follows, therefore, as we think, that the circuit court did not err in sustaining the appellee's motion for the dismissal of the attempted appeal in this case.

The judgment is affirmed, at the appellant's costs.

~~The Evansville Gas-Light Co. v. The State, ex rel. Reitz, Auditor, et al.~~

No. 7928.

THE EVANSVILLE GAS-LIGHT CO. v. THE STATE, EX REL.
REITZ, AUDITOR, ET AL.

REVIVAL OF JUDGMENT.—*Foreclosure of Mortgage.—Limitation.*—A decree of foreclosure is not an ordinary judgment within the meaning of section 527 of the code, and an action to revive such judgment or decree will lie at any time within twenty years from the date thereof.

FORECLOSURE.—*Mortgage Lien.—Merger.—Extinguishment.*—A decree of foreclosure merges the right of action, but not the lien of the mortgage.

SAME.—*Order of Court.*—Where the original mortgagor has made several conveyances to different persons, the court will, upon foreclosure, decree that the parcels shall be sold in the inverse order of the dates of the conveyances; but this rule applies only where the mortgage is a lien resting alike upon the whole of the land.

From the Vanderburgh Circuit Court.

A. Iglehart and *J. E. Iglehart*, for appellant.

W. F. Smith, T. E. Garvin and *G. Palmer*, for appellees.

ELLIOTT, J.—The State, by the auditor of Vanderburgh county as relator, prosecuted this suit against the appellant and Francis J. Reitz, and obtained judgment against the former, but not against the latter. The object of the action was to revive a decree of foreclosure upon two school-fund mortgages, which had been taken against James G. Jones and wife.

A special finding of facts was made by the court, at the request of parties, which is as follows:

“1st. That the decree of foreclosure and order of sale set out in the complaint, whereby it was, on May 12th, 1862, adjudged that there was due from said James G. Jones, to the State of Indiana, the sum of four hundred and fifty-seven dollars, upon the mortgages mentioned in said decree, is still in full force and wholly unsatisfied.

“2d. That said James G. Jones departed this life on or about the 15th day of April, 1872.

73	219
127	197
73	219
129	574
73	219
141	248
73	219
146	51

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“3d. That no execution has been issued upon said decree since May the 17th, 1862, and which was returned on the 4th day of June, 1862, no replevin bail having been entered.

“4th. That lot 23, block 171, was, on the 7th day of December, 1871, conveyed to defendant F. J. Reitz, by said James G. Jones and Rosanna, his wife.

“5th. That on the 3d day of November, 1865, said Jones and wife conveyed said lot 29, in block 129, Lamasco City, to said defendant, The Evansville Gas-Light Company.

“6th. That said Jones had no title in said lot 12, block 135, when the same was conveyed by him to the plaintiff.

“7th. That said decree of foreclosure was rendered upon two several mortgages, one dated April 14th, 1855, upon said lot 23, block 171, and the other dated the 5th day of August, 1859, upon said lot No. 29, block 129, both to secure the same sum.

“8th. That the other defendants beside said gas company and said Reitz have no interest in the property mentioned in the complaint (lots 23 and 29).”

Upon these facts conclusions of law were stated as follows :

“1st. That the plaintiff is entitled to have execution for the satisfaction of said decree, together with interest thereon, from the rendition thereof, and the costs thereon taxed, to be satisfied only by the sale of said lot 29, block 129.

“2d. That, as to the issue between the said defendant gas company and said Reitz, the equity is in favor of said Reitz, and the court finds for said Reitz, and that upon said issue he is entitled to recover his costs.

“3d. That, as to the issue between the said defendant Reitz and the plaintiff, the court finds in favor of said Reitz.

“4th. That said mortgage upon said lot 23, block 171, having been executed more than twenty years, said decree, as to said lot, is barred, and can not be enforced.

“5th. That as to all the other defendants, excepting said

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gas company and F. J. Reitz, said complaint ought to be dismissed."

The decree of foreclosure which this proceeding sought to revive was, as appears from the special finding, rendered on the 12th day of May, 1862, and this action was not instituted until the 10th day of November, 1877, more than sixteen years afterward. The appellant insists that the lien of the decree ceased at the expiration of ten years from the date of its rendition. The argument is that the mortgage was merged in the judgment, and that, as the statute limits the lien of a judgment to a period of ten years from its date, with the expiration of that period terminated the lien of the decree sought to be revived.

Appellant's chief reliance is upon section 527 of the code, which provides, *inter alia*, that all final judgments for the recovery of money or costs shall be a lien upon real estate for ten years after the rendition thereof, and no longer. 2 R. S. 1876, p. 233. The statute in terms applies only to judgments for the recovery of money, and does not apply to a decree of foreclosure establishing a specific mortgage lien upon real estate, and we do not think it should, by construction, be so extended as to apply to such decrees of foreclosure. Section 642 of the code is also relied upon by the appellant. If the appellant is correct in asserting that the judgment merges both the lien of the mortgage and the cause of action evidenced by it, and that the lien of the judgment takes the place of that of the mortgage, then, under the provisions of either statute, it is entitled to a reversal.

If the decree of foreclosure, which the State obtained against Jones and wife, is to be treated as an ordinary judgment, then it must be held that the lien was lost long before this action was instituted. The controlling question, therefore, is, whether a decree of foreclosure is to be treated as

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an ordinary judgment; for, if it is to be so regarded, then the appellant is clearly right.

If the judgment merged the mortgage lien, then the mortgage lien was extinguished. It will not do to assume, as a matter of course, that there was a merger, for there are many cases in which, in order to prevent injustice, courts will not allow merger to take place, although all the essential elements of a technical merger combine in the particular case. Mergers are not favored. As Chief Justice PARKER tersely said, in *Gibson v. Crehore*, 3 Pick. 475, "Mergers are odious in equity."

Nor is it clear that, where a mortgage is foreclosed, the decree "swallows" the lien of the mortgage. There are at least two very strong reasons why this can not on principle be so: First, the mortgage lien is a specific one, the judgment a general one, and the lien of the former is, therefore, the superior one. The difference between mortgage and judgment liens is clearly drawn by WORDEN, J., in *Gimbel v. Stolte*, 59 Ind. 446. Second, the lien of the mortgage is superior in duration to that of the judgment. In these two essential particulars, the mortgage lien is the greater, and it would seem almost a contradiction of terms to declare that the inferior lien can swallow the greater. The whole theory of merger is that the greater estate or thing takes into itself the less, and this can not be so where there are essential particulars in which the one alleged to be the inferior is really the superior. It can hardly be possible that even an imaginary legal entity can be conceived as capable of absorbing into itself another thing greatly larger in two very essential and prominent features.

The merger of a judgment takes up the mortgage as a cause of action, but not as a lien. There is a broad distinction between a merger of a cause of action and the merger of a lien. It is owing to error in confusing the merger of the cause of action with the merger of a lien, that some of

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the courts have been led into the erroneous holding, that a judgment extinguishes the mortgage lien.

A suit of foreclosure is a remedy for the enforcement of a mortgage lien, and it ought not to be abridged by holding that the decree cuts down, rather than enlarges, the lien. Without a decree the lien continues for twenty years, and surely that which is meant to carry into effect this lien ought not to be allowed to have the effect of shortening the duration of the lien to a period one-half shorter than that for which it would continue without the decree. Upon principle it is, in our opinion, very clear, that although the judgment merges the mortgage as a cause of action, it does not abridge or extinguish its lien.

Although there is some conflict in the authorities, we think the weight is with the doctrine, that the decree of foreclosure does not merge the lien of the mortgage. Counsel cite us to Freeman on Judgments, sections 215 and 216, but we think these sections afford appellant's theory no support. The author is speaking of the effect of a judgment upon the mortgage as a cause of action, not of its effect upon the lien created by the mortgage. There can not well be two opinions upon the proposition, that the mortgage as a cause of action is merged in the decree, and that all rights growing out of it as a right of action are merged in the judgment or decree. This, however, is not the point here in debate. In *The People v. Beebe*, 1 Barb. 379, it was held that the lien of the mortgage was merged in the decree, and this doctrine is stated approvingly in *Gage v. Brewster*, 31 N. Y. 218. These are the only cases to which appellant has referred, and we have found no others supporting the doctrine they declare.

There are many well-considered cases holding a doctrine different from that declared by those upon which appellant relies. In our own reports, we have the case of *Lapping v. Duffy*, 47 Ind. 51, where it was held that a judgment did not extinguish the lien of the mortgage. It is true that the

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case just cited did not pass upon the question as here presented, but the principle enunciated is substantially the same as that which must govern the case under examination. We have also the case of *Teal v. Hinchman*, 69 Ind. 379, where the same general doctrine is declared and enforced. In the case of *Helmbold v. Man*, 4 Whart. (Pa.) 409, the question was considered and decided adversely to the doctrine of the New York cases. It was there said: "The lien was created by the mortgage itself; the judgment neither added to, nor took anything from it; and it is clear, therefore, that the acts of Assembly, which require judgments creating liens or binding lands or real estate, to be revived every period of five years, for the purpose of continuing such liens, do not extend to or embrace the liens of mortgages, and can have no application to or bearing upon them whatever."

The rule, that the mortgage lien is not merged in the decree, is asserted by the Supreme Court of Iowa in two well-considered cases: *Stahl v. Roost*, 34 Iowa, 475; *Hendershott v. Ping*, 24 Iowa, 134. The same rule has long since been the settled law of Missouri. *Riley's Adm'r v. McCord's Adm'r*, 21 Mo. 285. Illinois has adopted and enforced a like doctrine. *Priest v. Wheelock*, 58 Ill. 114.

The rule, that the lien of the mortgage is not absorbed by the decree or judgment, is in harmony with settled general rules, while the opposite doctrine is in direct conflict with them. It is a rule of very frequent application, and upon which there is no contrariety of judicial opinion, that a mortgage lien is only extinguished by payment or release, and, with this rule, the doctrine that the decree does not merge the lien of the mortgage fully harmonizes; while the opposite rule is in direct and irreconcilable hostility to it. We have already adverted to the well known rule, that, as the lien of the mortgage is specific, while that of the judgment is general, the former is the superior. The doctrine, for which the appellant contends, that the lien of the judgment

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supplants that of the mortgage, can not be brought into harmony with the general rule just stated. There is a sharp and full conflict, but we deem it unnecessary to multiply illustrations. It is obvious that appellant's theory jars and conflicts with many settled principles; while the opposite theory agrees and harmonizes with all the great rules of law, except the technical one of merger, a doctrine neither important in its practical results, nor well supported by either reason or authority.

Counsel insist that the court erred in finding in favor of Francis J. Reitz upon the issue joined between him and the appellant. The position of appellant is, that, as Reitz did not acquire title until six years after the acquisition of title by the appellant, his lot ought to have been ordered to be first sold before resorting to that purchased by the appellant. It is true, as counsel assert, that, where the original mortgagor has made several conveyances to different persons, the court will, upon foreclosure, decree that the parcels shall be sold in the inverse order of the dates of the conveyances, but this rule does not meet the question here presented. The rule applies where the mortgage is a lien resting alike upon the whole of the land, but it can not apply where the mortgage is not a lien upon one of the parcels. The mortgage which covered the lot of Reitz was executed more than twenty years prior to the institution of the appellee's proceedings, and was, therefore, fully barred by the statute of limitations. The rule upon which appellant insists was not intended to impair the rights of the mortgagee, and is never permitted to have that effect. The rule enforces the equity maxim, that "equities prevail in the order of time," by adjusting the burden of the mortgage indebtedness in the order of purchases.

It is contended that, as there was no pleading of Reitz setting up the statute of limitations, the court did wrong in finding in his favor upon the issue made upon appellant's

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cross complaint. We do not think the point urged can avail the appellant. The case was not one in which such a pleading was proper, and there was, therefore, no substantial error in holding against appellant. *Plough v. Reeves*, 33 Ind. 181. The question as to whether there was any lien to revive was directly and necessarily presented by the pleading of the State. Its decision was inseparably connected with the determination of the main issue, and, in determining the issue, the question of the existence of a lien on Reitz's lot was necessarily adjudicated. It was impossible to determine the issue tendered by the complaint, without settling the question of the existence or non-existence of a lien upon the lot of Reitz. There was, therefore, no available error committed in holding that appellant had no right to relief against Reitz. If Reitz's lot was entirely free from the burden of the mortgage lien which the State sought to revive, then surely the appellant could have no right to ask that Reitz's lot be made subject to an extinguished lien.

Judgment affirmed.

No. 6348.

HEALY v. ISAACS.

ARBITRATION AND AWARD.—*Statutory Submission.*—*Judgment on Award.*—*Rule to Show Cause.*—Where a complaint was filed in vacation, accompanied by a written agreement of the parties, providing for the submission of all matters in controversy "to the arbitrament and award" of E. and B., who, in case of disagreement, were to call in a third person, the award so made to be entered as an order and judgment of the court, and said E. and B. took an oath to "hear and examine the matters in controversy, and make a just award," and afterward reported their award to the court.

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Held, that said E. and B. were arbitrators, and not referees merely, and such proceeding was a statutory arbitration, and the award a statutory one. *Held*, also, that the court could not confirm such award and render judgment thereon until such submission and award had been entered of record, and a rule thereon to show cause had been duly granted and served, as provided in section 13 of the arbitration act; and, until such confirmation, such award remained *in fieri*, and no valid judgment could be rendered thereon.

From the Vanderburgh Circuit Court.

C. Denby, D. B. Kumler, A. Iglehart and J. E. Iglehart, for appellant.

W. M. Blakey, P. W. Fry, A. Gilchrist and C. H. Butterfield, for appellee.

Howk, C. J.—In this action the appellee sued the appellant for an accounting as to certain partnership transactions between them, as book-sellers, job-printers, etc., claiming that upon such accounting there would be found a balance due him of five thousand dollars, for which the appellee demanded judgment.

We do not find that any answer was filed by the appellant to the appellee's complaint; but, after the commencement of the suit, the first order of the court entered therein was, in substance, as follows:

“Now come the parties and file their written agreement, by which it appears that they have submitted all the matters in controversy herein to Herman Engle and William M. Bell, for their arbitrament and award; and said parties now here, in open court, mutually choose the said parties as arbitrators herein, and direct them to report their award to the present term of this court. It is therefore ordered and decreed that all the matters in controversy herein be referred to Herman Engle and William M. Bell for their arbitrament and award; and they are directed to report their award to the present term of this court; and said Engle and Bell are now duly sworn, in open court, faithfully and impartially to investigate, adjust and report the matters herein submitted to their arbitrament.”

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This order was made and entered in this cause at the February term, 1877, of the court below. Afterward, at the same term of the court, "the award of said arbitrators was filed and acknowledged in open court," in substance, as follows:

"The undersigned, arbitrators, duly selected and appointed by said parties, in the above entitled action, to decide all matters in controversy between them, growing out of the books, business and accounts of the late firm of Healy, Isaacs & Co., do hereby make the following award, to wit:

"We hereby decide that said John Healy is indebted to said Albert C. Isaacs in the sum of four thousand eight hundred eight $\frac{57}{100}$ dollars, and that said Healy should pay the said Isaacs that sum of money; and that said sum, when received by said Isaacs, shall be had in full settlement of the matters submitted to us for arbitration as aforesaid. We further find and decide, that the costs of the clerk and sheriff, in the above cause, should be paid one-half thereof by the said Isaacs, and half thereof by said Healy. We further find and decide, that, for and in behalf of our services in this arbitration, each of us should receive five hundred dollars, and that said Isaacs should pay said sum to the undersigned Herman Engle, and said Healy should pay an equal amount to the undersigned, William M. Bell. February 26th, 1877.

[Signed]

"HERMAN ENGLE.

"Attest: AZRO DYER.

WILLIAM A. BELL."

On the same day this report was filed and acknowledged, an entry was made of the substance of the report, on the order book, and of the judgment of the court thereon, in favor of the appellee, for the amount found due him therein from the appellant, allowing each of said arbitrators the sum of six dollars for his services, to be taxed as costs, and adjudging that the costs be paid equally by the parties. This entry does not show any appearance of the parties, or either of

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them, at the time of the filing of said report, and of the rendition of judgment thereon.

Afterward, at the same term of said court, the appellant appeared by counsel, and filed his written motions to vacate and set aside the judgment herein, and to vacate and set aside the award of said arbitrators, and also his further motion to postpone the hearing on the first two motions until the next term of the court. All of these motions were supported by affidavits, and counter affidavits were filed by the appellee; and, upon the hearing then had, each and all of the said motions were overruled by the court, and to each of these rulings the appellant excepted and filed his bill of exceptions.

In this court the appellant has assigned as errors the following decisions of the circuit court:

1. In entering the *nunc pro tunc* order, set out in the record;
2. In overruling his motion to set aside the award;
3. In overruling his motion to set aside the referees' finding;
4. In overruling his motion for a new trial;
5. In overruling his motion for a continuance of the hearing of his other motions; and,
6. In rendering the judgment set out in the record.

The action of the circuit court, in directing the clerk to enter upon its order-book at full length the arbitrators' award, or the referees' report, whichever it may be properly termed, then as of the date of the filing thereof, which is the *nunc pro tunc* order mentioned in the first alleged error, was not erroneous, in our opinion, and certainly was not an available error for the reversal of the judgment below.

In considering and deciding the several questions arising under the other alleged errors, it seems to us that the fundamental and controlling question in the case is this: What was the character, under the law, of the proceedings had in

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the case by and before Herman Engle and William M. Bell? Were the matters in controversy, between the parties to this action, submitted by them to said Engle and Bell, as arbitrators, for their arbitrament and award, under the provisions of "An act relative to arbitrations and umpirages," approved February 3d, 1852? Or was there a reference of "all or any of the issues in the action," made by the court to said Engle and Bell, as referees, under the provisions of section 349 of the code? Was the decision of said Engle and Bell, which they reported in writing to the court, a "referees' report," or a "statutory award?"

The correct decision of the case at bar depends, as we think, upon the answer which must be given to the question whether the said Engle and Bell were acting in the case as referees, under an order of the court, or as arbitrators, under and by virtue of the written submission to them, by the parties to the suit, of the matters in controversy between them. Upon this question we have no doubt, from the facts shown by the record before us, that the said Engle and Bell were acting in this case as arbitrators, under a written submission to them of the matters in controversy, made by the parties to the suit long before the idea of a reference under the code had apparently entered the mind of either of them, in an attempted conformity, at least, to and with the requirements of the statute "relative to arbitrations and umpirages." The record shows that the appellee filed his complaint in this case, on the 25th day of August, 1876, in the vacation of the court, for the ensuing September term thereof, which began under the law on the first Monday in September. On the day of the filing of said complaint, the record shows that the parties to the suit, plaintiff and defendant, executed a written agreement of submission, in substance, as follows:

"ALBERT C. ISAACS, Plaintiff,	} In the Vanderburgh Circuit Court, September Term, 1876.
vs.	
"JOHN HEALY, Defendant.	

"Whereas, in the above entitled suit, a controversy exists

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concerning what amount, if any, said Isaacs is entitled to from said Healy, on a full and correct settlement of the business, books and accounts of the late firm of Healy, Isaacs & Co. : Now, therefore, said partners hereby mutually agree to submit all said matters of controversy to the arbitrament and award of Herman Engle and William M. Bell, who, in case of disagreement, shall call in a third competent book-keeper ; and we agree that the award made by any two of these persons shall be binding upon us, and shall be entered as an order or judgment of said court, in the above entitled cause ; and we agree with each other, in the penalty of 5,000 dollars, to abide and faithfully perform said award.

“Aug. 25th, 1876.”

(Signed) “A. C. ISAACS.

“JOHN HEALY.”

The record further shows, that on the 6th day of September, 1876, the said Engle and Bell took and subscribed an oath to the effect “that they will faithfully and fairly hear and examine the matters in controversy, and make a just award, according to the best of their understanding, in the case of Albert C. Isaacs against John Healy, submitted to them for arbitration.”

The record fails to show any appearance of the parties, or action of the court, in the case, at the September term, 1876 ; and at the November term, 1876, the only entry made in the case is, “Now here this cause is continued.”

Six months after the submission of the matters in controversy to the arbitrament and award of said Engle and Bell as arbitrators, at the February term, 1877, the first order in the case was made and entered by the court, as heretofore set out in this opinion ; and it will be seen from that order that the said Engle and Bell were designated therein as arbitrators, and were thereby directed to report their award to the court at that term. Seven days after the entry of said order, and at the same term of the court, the said arbitrators reported their award, heretofore given, and acknowl-

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edged the same in open court; and, on the same day, the court rendered judgment on said award.

We are of the opinion, upon the facts shown by the record, that the said Engle and Bell were not referees under the provisions of the code, but that they were arbitrators in a statutory arbitration, and their award, as reported to the court, was a statutory award. *Spencer v. Curtis*, 57 Ind. 221. When, therefore, the arbitrators reported and acknowledged their award, it seems to us that, under the provisions of section 13 of the statute relative to arbitrations, the court should have caused the submission and award to be entered of record, and should have granted a rule thereon against the appellant "to show cause at that or the succeeding term of the court, why judgment shall not be rendered by such court upon the said award." 2 R. S. 1876, p. 320. The court is not authorized by the statute to confirm the award and render judgment thereon until the rule to show cause has been served, ten days or more before the return day of such rule; and, until such an award is confirmed by the proper court, it remains *in fieri*, and no valid judgment can be rendered thereon. *Shroyer v. Bash*, 57 Ind. 349; *Boots v. Canine*, 58 Ind. 450; *Anderson v. Anderson*, 65 Ind. 196.

For the reasons given, we are of the opinion that the court clearly erred in rendering the judgment on the award, set out in the record, and in overruling the appellant's motion to vacate and set aside said judgment.

The judgment is reversed, at the appellee's costs, and the cause is remanded with instructions to issue a rule on the award to show cause, etc., and for further proceedings thereon.

Knox v. Wible.

No. 8581.

KNOX v. WIBLE.

PLEADING.—*Damages, Direct and Consequential.—False Representation.—Fraud.—Practice.—Demurrer.*—In an action for damages, the complaint alleged that the plaintiff was engaged in a business which required him to own and use horses and mules, and at a certain time he was the owner of several horses and mules, of a specified value; that at that time the defendant, for the purpose of inducing the plaintiff to purchase a horse from him, falsely and fraudulently represented that such horse was sound, except a slight distemper; that the plaintiff, believing said false representation to be true, purchased such horse, which at the time had a contagious and deadly disease, of which plaintiff was ignorant; that said horse communicated the disease to the plaintiff's horses and mules, from which they ultimately died. Prayer for value of horses and mules, and damages.

Held, that the complaint was sufficient on demurrer, and stated a good cause of action, both for direct and consequential damages.

Held, also, that an objection that the allegations of the complaint were too indefinite must be made by motion to make specific, and could not be reached by demurrer.

From the Washington Circuit Court.

A. B. Collins, T. B. Buskirk, G. W. Friedley and E. D. Pearson, for appellant.

S. B. Voyles, H. Morris, H. Heffren, J. B. Brown and J. A. Zaring, for appellee.

NIBLACK, J.—Suit by Benjamin F. Wible, against William B. Knox, for deceit in the sale of a horse, resulting in consequential damages.

The complaint was in three paragraphs. The first averred that, on the 18th day of September, 1878, and prior thereto, the plaintiff was engaged in a business which required him to own and use horses and mules; that he did, on that day, own two mares and two mules, of the value of one hundred dollars each, all of which were sound and in good condition; that, at that time, the defendant was the owner of a certain sorrel horse; that, for the purpose of inducing and procuring the plaintiff to purchase said sorrel horse, and take the

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same into his possession, the defendant falsely and fraudulently represented to the plaintiff that said sorrel horse was sound and well, except a slight distemper, of which he was about well; that the plaintiff fully believed said false representations to be true, and wholly relied upon them, and was induced thereby to purchase, and did purchase, said horse and take him into his possession; that, at the time the plaintiff so became the purchaser thereof, the said sorrel horse had the contagious and deadly disease known as "glanders," of which fact he, the plaintiff, was entirely ignorant; that said horse communicated said disease to the plaintiff's said mares and mules, by reason of which they became sick and disordered, and, in consequence of which, the plaintiff was put to great trouble and expense, and hindered and delayed in his business; that said horse, mares and mules ultimately died from said disease, and the value thereof became wholly lost to the plaintiff. The second and third paragraphs were substantially similar to the first, except that the second charged the disease to be "farcy."

Separate demurrers to all the paragraphs of the complaint were overruled, and the defendant answered in general denial. A jury returned a verdict for the plaintiff for six hundred and ninety dollars, and, after overruling a motion for a new trial, the court rendered judgment against the defendant upon the verdict.

The objection urged to the several paragraphs of the complaint is that they were too indefinite and uncertain in their allegations. But that objection was not reached by the demurrers to those paragraphs. It ought to have been raised, if at all, by a motion to have the paragraphs made more certain and definite. All of the paragraphs were, we think, substantially sufficient upon demurrer, and constituted good causes of action, both for direct and consequential damages. This conclusion is sustained by the following authorities, as well as others which might be cited: Hanover on Horses,

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pp. 186, 187 ; *Rose v. Wallace*, 11 Ind. 112 ; *Fultz v. Wycoff*, 25 Ind. 321.

It is insisted that the verdict was not sustained by sufficient evidence, and that the damages were excessive. The evidence was quite conflicting, but there was evidence tending, in all essential respects, to sustain the verdict. We can not, therefore, disturb the verdict upon the evidence. The jury evidently went to the utmost limit in the assessment of the damages, but we would not be justified in holding that the damages were absolutely excessive.

No sufficient reason has been shown for a reversal of the judgment.

The judgment is affirmed, with costs.

No. 7351.

BERRY v. REED, SHERIFF, ET AL.

73	235
146	514

PLEADING.—*Judgment.*—*Written Instrument.*—A judgment, or a transcript thereof, is not a written instrument which must be filed with a pleading setting up such judgment, and if filed therewith forms no part, and can not be considered in determining the sufficiency, of such pleading.

JUDGMENT.—*Lien of.*—Under the provisions of sections 528 and 529, 2 R. S. 1876, p. 234, the transcript of a judgment, filed in a county other than that where rendered, does not create a lien on real estate in such county against subsequent purchasers thereof in good faith, without notice, unless recorded and entered in the judgment docket of the court of such county.

From the Jay Circuit Court.

J. W. Headington and *J. J. M. LaFollette*, for appellant.

M. B. Miller, *L. J. Monks* and *J. M. Haynes*, for appellees.

Berry v. Reed, Sheriff, et al.

WOODS, J.—Action to enjoin the sale of certain real estate. The appellant, who was the plaintiff, claimed title in fee by a general warranty deed, of September 2d, 1872. It is further averred in the complaint that the defendant Sylvester Miller, on the 18th day of October, 1877, caused an execution to issue out of the clerk's office of the Randolph Common Pleas Court, on a pretended judgment of said court, against John Garland and William Garland, in favor of said Miller, for \$640.42, with interest and costs, directed to the sheriff of Jay county, wherein said land is situate, which execution was placed in the hands of the defendant Charles Reed, sheriff of said county of Jay, and was by him, on the 15th day of November, 1877, levied on the undivided one-half of said real estate, and advertisement of sale thereof made for the 22d day of December, 1877, to satisfy said execution; that said judgment is invalid as against said William Garland, because rendered without notice, and without appearance or answer on his behalf; that said judgment is in no way a lien on the land of the plaintiff, hereinbefore described, nor is said execution a lien thereon, or on any part thereof; that the defendants are intending to sell, and will sell, the same by virtue of said writ unless restrained, and will so cast a cloud on the title of the plaintiff. Wherefore, etc.

A demurrer for want of facts was filed to this complaint; and the death of Sylvester Miller having been suggested, and his heirs at law made defendants, said demurrer was overruled. No exception. The defendants answered by a general denial, and by a special plea, in substance, as follows: That in July, 1869, said Sylvester Miller, since deceased, obtained a judgment against John Garland and William Garland, in the court of common pleas of Randolph county, Indiana, for the sum of \$640.42, which remains unpaid, unsatisfied, and in full force; that said William and John Garland appeared to said action in person and by at-

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torney, and filed an answer therein, on which issues of fact were formed and tried by the court, as appears of record remaining in said court, a transcript of which proceeding and judgment is filed herewith; that on the 25th day of March, 1871, a duly certified transcript, under the hand and seal of the clerk of said court, of said judgment was filed in the clerk's office of the circuit court of Jay county, Indiana, that is to say, in the office of the acting clerk of the court of common pleas of said county; that said William Garland, on the 25th day of March, 1871, and for a long time thereafter, held and owned by deed in fee simple the land described in the complaint, and said judgment was a lien on the land so owned and held by said William Garland at the time it was conveyed to the plaintiff. Wherefore, etc.

The plaintiff demurred to this answer for the want of facts, and saved an exception to the overruling thereof. Thereupon the plaintiff filed a reply in four paragraphs, the first being a general denial, and the second, to which a demurrer was sustained over the plaintiff's exception, being substantially as follows: It is admitted that said William Garland owned said land on the 25th day of March, 1871, and thenceforward until the 2d day of September, 1872, but that on said last named day the plaintiff purchased the same of Peter W. Bishop, who purchased the same of said Garland, without any notice whatever of said pretended lien mentioned in the said second paragraph of answer, or of any pretended transcript filed in the office of the clerk of the circuit or common pleas court of Jay county, Indiana; and the plaintiff avers that, at the time he purchased said land of said Bishop, he made and caused to be made a full and complete examination of the records of the office of the clerk of said county and of said courts, and found no entry or memorandum of the filing or record of said transcript on the judgment dockets, order books or any of the records in the office of said clerk, and avers the truth to be that there

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never was any entry or memorandum on any of the records of said county, of the filing of said pretended transcript.

The appellees have assigned cross errors upon the overruling of their demurrers to the complaint, and to the third and fourth paragraphs of the reply, but have favored us with no brief thereon, or in reference to the errors assigned by the appellant. The cross errors are therefore waived, and, if anything to the advantage of the appellees in the case shall be overlooked by the court, the blame must rest with themselves. We do the best we can to reach a just and lawful conclusion on every question, but it can not be fairly asked or expected of us that, in behalf of parties who do not even so much as make a suggestion or citation to aid us, we will, in the press of business which is upon us, employ the labor and zeal of hired attorneys, in order to serve or preserve their interests.

The appellant contends that the second paragraph of the answer is bad, and that the demurrer thereto should have been sustained, because the transcript of the judgment and proceedings, which is filed therewith, shows that William Garland was not served with process, and did not waive service in any way. The plea does not rest on this transcript, and its sufficiency is not affected thereby, but must be determined by its own averments. So considered, the answer is clearly good. Indeed, the appellant does not claim otherwise.

That a judgment, or transcript thereof, is not a written instrument, which must be filed with and become a part of a pleading which sets up such judgment, has been repeatedly decided by this court, and it is equally well settled that, if filed with the pleading, the transcript or copy of the judgment forms no part of it, and can not be considered in determining the sufficiency of the averments. The answer was good, and so, also, was the reply. The code contains the following provisions:

“SEC. 527. All final judgments in the Supreme and cir-

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cuit courts, and courts of common pleas, for the recovery of money or costs shall be a lien upon real estate, and chattels real, liable to execution in the county where the judgment is rendered for the space of ten years after the rendition thereof, and no longer, exclusive of the time during which the party may be restrained from proceeding thereon by any appeal, or injunction, or by the death of the defendant, or by agreement of the parties entered of record.

“SEC. 528. It shall be the duty of the clerk of the court rendering any judgment, to make out a certified copy thereof, under the seal of the court, at the request of any person interested, which copy if taken from the circuit or Supreme Court, may be filed in the office of the clerk of any circuit court, and if taken from the common pleas, in the office of the clerk of any court of common pleas of this State, and when so filed, shall be recorded and entered in the judgment docket in the same manner as judgments rendered in such court.

“SEC. 529. Such judgment, from the time of filing the copy aforesaid, shall be a lien upon all the real estate of the judgment-debtor situated in the county where filed, as fully as if such judgment had been rendered therein.”

The appellant contends, and we think correctly, that, under these provisions, it is necessary that the copy or transcript of a judgment be not only filed, but also recorded and entered in the judgment docket, in order to constitute notice of the lien thereby acquired as against subsequent purchasers without notice thereof. As between the immediate parties to the judgment, and as to all who have notice, it is doubtless proper to hold that the judgment constitutes a lien from the time of filing the copy of the judgment, and that the failure of the clerk to enter and record the judgment in the judgment docket can not defeat the lien; but to apply this rule to purchasers without notice, would open the way to great injustice and fraud, and would bring the titles to real estate into such uncertainty as would greatly

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impede the transfer thereof. The plain intent of the lawmakers was that the filing and recording provided for in section 528 should be substantially contemporaneous acts, and where, by the next section, it was enacted that the judgment should be a lien from the time of filing, it was meant as against subsequent purchasers without actual notice, that a judgment filed, recorded and docketed as required in the previous section, should be a lien.

This construction is in some degree supported by the doctrine laid down in Freeman on Judgments, sec. 343, wherein it is said that "While judgments are for other purposes valid as soon as rendered, they do not become liens upon real estate, at least against subsequent purchasers, without notice, until docketed. Such purchasers are not bound to examine for judgment liens further than to look into the proper dockets. If the clerk or prothonotary fails to make the proper entries in his dockets, the only remedy of an aggrieved judgment creditor is by action against the officer." By section 527 of the code, quoted *supra*, judgments are a lien in the county where rendered from the date of rendition, and by section 513 the clerk is required, within thirty days after each term of the court, to enter on a docket, in alphabetical order, a statement of each judgment rendered at such term, and by section 516 is made liable, for neglecting to make the entry, to any person injured, for the amount of damages sustained by such neglect. Under these provisions, the purchaser of real estate, for thirty days after the close of a term of court, is bound to look to the order books for the judgments rendered at such term; and such may be the rule, even after the expiration of the thirty days. The purchaser may be the one who must look to the clerk for damages for his neglect to make the proper entries in the judgment docket. The more reasonable rule, however, would seem to be to require the judgment plaintiff to look to such relief. He knows, or may fairly be presumed to know, of his judgment,

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and has it in his power to guard his interests therein by seeing that the clerk properly docketts his judgment in the time prescribed, and, if he neglects to do so, should not complain if his lien is lost, as against a purchaser without notice, who had no means of protecting himself. But deciding nothing as to the lien of judgments in the counties where rendered, and where in every case there is a record, in some form, which is accessible to every purchaser, and confining our decision to the case before us, we hold that the transcript of a judgment filed in another county, under the provisions of sections 528 and 529 of the code, *supra*, does not create a lien against subsequent purchasers in good faith, without notice, unless recorded and entered in the judgment docket.

It follows from this conclusion, that the court erred, also, in excluding the evidence offered by the appellant to show that the transcript of the judgment had not been entered and recorded as required, in the judgment docket of the Jay Common Pleas, and that the plaintiff had made and caused to be made an examination of said records and dockets, and did not find an entry, nor in fact know of said judgment.

A consideration of the other points suggested by the counsel for the appellant has become unnecessary.

The judgment of the circuit court is reversed, and the cause remanded, with instructions to overrule the demurrer to the second paragraph of reply. Costs accordingly.

No. 7817.

NEWELL ET AL. v. SCHNULL ET AL.

73	241
143	683
73	241
145	547

RECEIVER.—*Notice of Appointment.*—*Process.*—Where the appointment of a receiver is prayed for as a measure of final relief, the process that brings the defendant into court to answer the complaint is sufficient notice to him of the final relief sought.

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Newell et al. v. Schnull et al.

From the Marion Superior Court.

A. F. Denny, for appellants.

A. C. Ayers and *E. A. Brown*, for appellees.

WORDEN, J.—This was an action by Henry Schnull against Lyne S. Newell and others, to foreclose a mortgage executed by said Newell to the plaintiff. Samuel C. C. Newell was made a defendant, it being alleged in the complaint that, after the execution of the mortgage, Lyne S. Newell had placed on record a conveyance to him of the equity of redemption. As part of the final relief sought, there was a prayer in the complaint for the appointment of a receiver. Judgment for plaintiff, and a receiver appointed. Appeal by the Newells from so much of the final order of the court as appoints the receiver, to general term, where the judgment at special term was affirmed.

The following paragraph in the brief of counsel for the appellants states the question involved: “The appellants, Newells, under the statute of March 12th, 1875, 2 R. S. 1876, p. 115, joined in an appeal from the order of the court appointing a receiver, and it is from this order alone that the appeal is taken.”

The 1st section of the statute above mentioned provides, “That receivers shall not be appointed by any court, in any case, until the adverse party shall have appeared and answered in the action pending, or shall have had reasonable notice of the pendency of the action and the application for such appointment.”

The 2d section provides for an appeal from the order appointing or refusing to appoint a receiver.

The sole objection to the appointment of the receiver is that the appellants did not have due notice of the application therefor, as provided for in the statutory provision above quoted. This objection has no foundation whatever so far as Lyne S. Newell is concerned, for he had appeared and filed his answer in the cause.

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Samuel C. C. Newell, being a non-resident, was brought into court on an ordinary publication, and filed no answer in the cause. He appeared, however, for the purpose of objecting to the publication as being insufficient to authorize the appointment of a receiver. The receiver was not appointed pending the action; but the order of appointment follows the usual final decree.

The statute above quoted was not intended, as we think, to require any other or further notice of application for appointment of a receiver, than the process or publication that brings the defendant into court to answer the complaint, where such appointment is asked only as part of the final relief sought. Such special notice was intended to be required only in cases where a receiver is sought to be appointed *pending the action*, the defendant not having appeared and answered.

Probably, in cases where the defendant does not appear and answer, and there is no demand in the complaint for the appointment of a receiver, none could be appointed, even on notice, because, where there is no answer, the plaintiff can have no relief beyond that demanded in the complaint. Code, section 380. But where, as in this case, the appointment of a receiver is prayed for as a measure of final relief, the process that brings the defendant into court to answer the complaint is sufficient notice to him of the final relief prayed for. There was, therefore, no error in the ruling of the court below at general term.

The judgment below is affirmed, with costs.

No. 7372.

MANNS ET AL. v. THE BROOKVILLE NAT'L BANK ET AL.

CHATTEL MORTGAGE. — *Bank Stock.* — *Personal Property.* — *Lien.* — Bank stock is personal property, and may be mortgaged as such.

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SAME.—*Interest of Judgment Creditor in.*—*Execution.*—Judgment creditors have a right to levy on such interest only as the debtor had in the property when the lien attached, and an execution issued subsequent to the making and recording of a chattel mortgage is merely a lien on the debtor's equity of redemption.

SAME.—*Foreclosure.*—*Merger.*—A judgment of foreclosure does not merge the lien of the mortgage.

From the Franklin Circuit Court.

J. R. McMahan and T. H. Smith, for appellants.

H. Berry and F. Berry, for appellees.

ELLIOTT, J.—The complaint of appellants alleges that they recovered judgments against one Herman Linck, in October, 1875, and August, 1876, amounting in the aggregate to \$655.00; that, in September, 1876, executions were issued on said judgments and delivered to the proper officer; that the officer levied the executions upon ten shares of capital stock of the Brookville National Bank; that the said stock was duly advertised for sale; that the officer demanded access to the books of the bank for the purpose of making sale of said stock; that his demand was met by a refusal; that John Masters and John G. Adair claimed to be the holders of mortgage liens on said stock; that they foreclosed said liens; and that Henry C. Kimbell claims to be the owner of said stock by purchase at a sale upon such foreclosure, and that his title is paramount to the lien of appellants' executions.

The appellee John Masters answered in two paragraphs. The first is a general denial. The second alleges that, prior to the issuing of appellants' executions, Herman Linck was indebted to him in the sum of \$3,500; that, to secure said indebtedness, Linck executed to appellee a mortgage upon the said capital stock; that the mortgage was properly recorded on the 27th day of August, 1875; that, on the 29th day of April, 1876, appellee obtained judgment against Linck for the indebtedness secured by said mortgage, and a decree

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foreclosing said mortgage; that the judgment and decree is unsatisfied; that he has never prevented or attempted to prevent a sale of the equity of redemption of the said Linck in the said capital stock.

The single question presented is the sufficiency of the paragraph of the answer under immediate mention, to which a demurrer was overruled by the trial court.

The position of the appellants' counsel is, that no interest in the capital stock in controversy could be transferred by way of mortgage. The broad doctrine is asserted that interest in the capital stock of banking or other corporations can only be transferred upon the books of the corporation, and in the manner prescribed by law. Starting from this assumption, the appellants reason themselves into the conclusion that no interest in such capital stock can be transferred in any other way.

Shares of stock in a corporation are personal property. *Tappan v. Merchants' National Bank*, 19 Wal. 490; *Hobbs v. Western National Bank*, 9 Rep. 467, (U. S. C. C.); R. S. U. S. 1878, sec. 5139; *Weyer v. Second National Bank of Franklin*, 57 Ind. 198. The general rule is, that "All property, real or personal, corporeal or incorporeal, * * * may be the subject of mortgage." 1 Hilliard Mortgages, 4. Herman says: "Everything which may be considered property, whether by the technical language of the law denominated real or personal property, may be the subject of a mortgage." Herman Chattel Mortgages, section 36. In another section of the same work, it is said that choses in action may be mortgaged, and among the various kinds are enumerated stock in corporations, bank shares and shares in a public library. Herman Chattel Mortgages, section 8; *Sherman v. Dodge*, 28 Vt. 26. The stock was the subject of mortgage, and the mortgage executed to the appellee conveyed a valid lien.

The appellee's answer does not assert that he is the owner of the stock, but that he has a lien paramount to that of the

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appellants. There can be no doubt as to the right of appellants to seize and sell Linck's equity of redemption; but that is not the point in controversy here. The right asserted by appellants is to have the lien of their executions declared to be superior to the lien of appellee's mortgage. They claim a greater right than the law will award.

Judgment creditors have a right only to such interest as the debtor had in the property when the lien attached. *The Monticello Hydraulic Co. v. Loughry*, 72 Ind. 562. When the lien of the appellants' executions attached, Linck, the execution debtor, had only a mere equity of redemption, and this was all the executions could reach. The decree of foreclosure did not merge the lien of the appellee's mortgage. The decree preserved and enforced this lien. It would be rank injustice to permit judgment creditors to break the continuity of a mortgage lien by treating the judgment as merging the mortgage lien and supplanting it with a new one springing into existence with the decree. The great weight of authority is against such a doctrine. *The Evansville Gas-Light Co. v. The State, ex rel.*, ante, p. 219; *Teal v. Hinchman*, 69 Ind. 379.

Judgment affirmed.

73 246
138 584

No. 7448.

CANADA v. CURRY.

WITNESS.—Impeachment.—Evidence.—A witness can not be impeached by proof or suggestion that he has been indicted for any offence.

SAME.—Rights of Judge and Jury.—Instruction.—Practice.—Whether a witness has sworn to one thing or another, whether his testimony is in conflict with that of another witness, and whether the testimony of conflicting witnesses is corroborated on one or both sides or not, are

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questions of fact for the jury. The court has no right to state to the jury what is true in fact, but only what is pertinent and true in law.

SAME.—Credibility.—The jury has the right, if they deem it proper, to credit the unsupported testimony of a witness over that of another, though corroborated.

From the Randolph Circuit Court.

E. L. Watson, W. E. Monks and W. A. Thompson, for appellant.

A. O. Marsh and A. Gullett, for appellee.

WOODS, J.—Suit by the appellant, claiming as the assignee of William Canada, against the appellee, upon a promissory note, and upon an open account. Issues were joined upon a plea of payment of the note, and by a denial of the account. The questions in the case arise upon the overruling of the appellant's motion for a new trial, which is assigned as error.

The first cause for which a new trial was asked is the overruling of the motion of the appellant "to strike out the 22d interrogatory, and the answer thereto, in the cross-examination of William Canada, as contained in his deposition." The plaintiff took the deposition of said witness in proof of the items of the account sued on, and in contradiction of the plea of payment of the note. The 21st and 22d questions and answers of the cross-examination are as follows:

"Ques. 21. Where did you go to after leaving Indiana?

"Ans. I settled in Iola, Kansas; I first settled in Erie, near Iola, in the spring of 1871; I remained in Kansas till the 10th of last November, farming most of the time, when I came to Kansas City; I have not been back to Indiana since I left; I started to go back, and got this far, and am on my way back; I am going back as soon as I get able.

"Ques. 22. Why did you not go back to Indiana to answer three indictments found against you for forgery, in Delaware county, in said State?

"Ans. There was never but one, that I ever heard of,

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and that was obtained by false swearing; the reason I have never gone back is because I have never had the means to go back; I have wanted to go back; not only that, I never heard of the intention to indict till over a year after I came to Kansas, and the indictment was not found until nearly two years after I came to Kansas; the name which it was claimed I forged was my partner's name, but the charge is false. On former occasions I had signed his name, with his consent, and supposed that, as his partner, I had the right to so use his name."

The counsel for the appellee undertake to support the latter question and answer on three grounds: First, as "proper, taken in connection with the 21st interrogatory and answer, for the purpose of showing, if it could be done by the witness himself, that the reason he had given for not returning to the State of Indiana was not the true reason;" and, Second, that the "interrogatory seems to * * * have been clearly proper as to the credibility of the witness. A conviction of a witness of the crime of forgery may be shown to affect his credibility. If the conviction of a witness may be shown for this purpose, certainly it was competent to show by the witness himself, if it could be done, that he was guilty of a crime which would affect his credibility;" and, Third, "conceding that the court erred, * * * the error was harmless, for the answer emphatically denies that the witness had been guilty of forgery, or that the indictment charging him with the commission of such crime influenced him to remain away from the State of Indiana. The appellee was bound by this answer, and the appellant was not bound by it."

This reasoning is fallacious throughout. It was entirely immaterial and irrelevant to any issue in the case and to any proper inquiry into the character or credibility of the witness, what may have been his reason for not having returned to Indiana; and, consequently, the volunteered statement of

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the reason, made in answer to question 21, was no justification for the 22d question, which assumes the existence or finding of three indictments against the witness, and asks him, not, as counsel assume, whether he was guilty, but why he did not go back to answer the indictments. We do not mean to intimate that the question would have been proper, if the witness had been asked if he was guilty as charged, but simply to mark the fact that the question, as asked and answered, has a meaning quite different from that on which counsel predicate their argument in support of it. The evident purpose of the question was to produce in the minds of the jury trying the case the impression that the witness had been three times indicted for forgery, and for that reason had not returned to the State. It is clearly not admissible to impeach a witness by proof or suggestion that he has been indicted for any offence. *Glenn v. Clore*, 42 Ind. 60; *Oliver v. Pate*, 43 Ind. 132; *Smith v. Yaryan*, 69 Ind. 445.

It can not be said that the error was harmless. Notwithstanding the denial of guilt by the witness, and his explanation of the circumstances, there remained his admission that he had been indicted, a circumstance calculated to deeply prejudice the jury against him. While it may be, in a technical sense, that the appellee was bound by the answer as elicited, the answer itself was more than the appellee was entitled to, and the jury was bound by no particular interpretation of the answer, nor to any particular inference therefrom. The ruling of the court was not only erroneous, but in all probability prejudicial to the case of the plaintiff.

The other causes assigned for a new trial have reference to the instructions of the court to the jury; and some of the points presented are such as ought to be decided, while others will doubtless be avoided, or not arise, on another trial.

In accordance with the request of the appellant, the court gave written instructions. The following instructions and

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parts of instructions are complained of, as invasions of the court into the province of the jury, viz.:

“12th. The note is not disputed by the defendant, but he, in his evidence, swears that it was fully paid in the hog transaction. The account the defendant under oath denies.

“13th. William Canada, the assignor, swears the account is just, and the defendant owes it. They differ in their evidence in regard to the balance due the defendant on the hogs, and also in regard to the manner of its application. Other witnesses have been introduced on both sides, tending to corroborate, on the one side, the deposition of William Canada, and, on the other side, the evidence of the defendant. There is a conflict and contradiction of the witnesses, in the evidence, to an unusual extent, in this case.

“18th. On the second paragraph of the complaint, there is a direct conflict in the evidence of William Canada and the defendant, so far as the account is concerned. You must look to the other evidence to see whether there is anything to corroborate either of the witnesses in this respect.”

Whether a witness has sworn to one thing or another, whether his testimony is in conflict with that of another witness, and whether the testimony of conflicting witnesses is corroborated on one or both sides or not, are questions of fact for the jury; and, under the established rules of practice in this State, defining the respective rights of the judge and jury, the court is forbidden to interfere with the exclusive right of the jury to determine all such questions. It is often a matter of sharp and doubtful dispute, what the testimony of a witness was on a given point, or whether there is conflict and contradiction in the evidence, or whether there is corroborating proof on any subject, or what inference may be drawn from, or supported by, an item of proof; and, if the court is allowed to indicate to the jury its understanding of the evidence, or its conclusions therefrom, in reference to these and like questions, the province of the jury becomes

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diminutively narrow and dependent, while the supremacy of the judge is extended beyond the domain of law, into that of fact, and becomes practically as absolute in one as in the other. It may be that the court said nothing but what was true in fact, but right there lies the distinction, and it should always be kept clear: The court may not state to the jury what is true in fact, but only what is pertinent and true in law. See the following among many cases which might be cited: *Conaway v. Shelton*, 3 Ind. 334; *Ball v. Cox*, 7 Ind. 453; *The Cincinnati, etc., R. R. Co. v. Clarkson*, 7 Ind. 595; *Reynolds v. Cox*, 11 Ind. 262; *McCorkle v. Simpson*, 42 Ind. 453; *Kintner v. The State, ex rel.*, 45 Ind. 175; *Barker v. The State*, 48 Ind. 163; *Hitesman v. The State*, 48 Ind. 473; *Dæring v. The State*, 49 Ind. 56; *Greer v. The State*, 53 Ind. 420; *Chamness v. Chamness*, 53 Ind. 301; *Matthews v. Story*, 54 Ind. 417; *Keiser v. Lines*, 57 Ind. 431; *Killian v. Eigenmann*, 57 Ind. 480; *Leasure v. Coburn*, 57 Ind. 274; *Ferguson v. Hosier*, 58 Ind. 438; *Cunningham v. The State, ex rel. Zartman*, 65 Ind. 377; *The Lafayette, etc., R. R. Co. v. Murdock*, 68 Ind. 137.

The clause quoted *supra* from the 18th instruction is subject to the further objection that it implies the proposition that the testimony of the defendant and that of William Canada must be regarded as evenly balanced, the one against the other, so far as the account was concerned, and that, if the jury could discover corroborating evidence in support of either, they should find accordingly. This was error. The jury had the right, if they deemed proper, to credit the unsupported testimony of either one of these witnesses over the testimony of the other, though corroborated.

Judgment reversed, with costs.

The Pennsylvania Company v. Lilly.

No. 6938.

THE PENNSYLVANIA CO. v. LILLY.

73	259
127	548
73	252
134	512
73	252
140	244

DAMAGES.—*Measure of, in Action by Parent for Death of Child.—Railroad.*
—Negligence.—In an action by a parent against a railroad company, for negligently causing the death of his infant child, he is entitled to recover only for the pecuniary injury he has sustained. The proper measure of damages is the value of the child's services from the time of the injury until he would have attained his majority, taken in connection with his prospects in life, less his support and maintenance. To this may be added, in proper cases, the expense of care and attention to the child, made necessary by the injury, funeral expenses and medical services.

SAME.—*Pleading.*—In such action, to enable the parent to recover full damages for the services of the child during his minority, such damages must be specially averred and demanded in the complaint.

SAME.—*Excessive Damages.—Verdict.*—Where, in such case, the complaint did not aver and demand damages for the loss of the future services of the child, and there was no evidence tending to show a loss of such services to the parent, a verdict assessing his damages at \$1,800 is excessive.

From the Marshall Circuit Court.

J. Brackenridge, A. Zollars and F. T. Zollars, for appellant.

M. A. O. Packard and O. M. Packard, for appellee.

NIBLACK, J.—This was a suit by James Lilly against the Pennsylvania Company, for killing his infant child. A demurrer to the complaint for want of sufficient facts being first overruled, the defendant answered in general denial. A jury returned a verdict for the plaintiff, assessing his damages at eighteen hundred dollars, and, in disregard of a motion for a new trial, judgment was rendered against the defendant upon the verdict.

The first error assigned is upon the overruling of the demurrer to the complaint. The complaint charged that the defendant owned and operated a line of railroad known as the Pittsburgh, Fort Wayne and Chicago railroad, extending into and across the county of Marshall in this State, and

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through the incorporated town of Bourbon in that county, and through the business and residence portion of that town, cutting its streets diagonally; that it was the general custom of the citizens of that town to use that portion of the track of said railroad, extending from Main street, at what is known as "Sheets' corner," eastward to the defendant's depot buildings, a distance of about thirty rods, as a public highway, or footpath, for all persons passing and repassing, which custom had existed ever since the location and construction of said railroad, and was well known to, and understood by, the defendant's servants; that on or about the 11th day of March, 1874, the plaintiff's daughter Emma, who lived with him and was five years of age, left his house to go to school, the school-house being about half a mile distant, and on the opposite side of the railroad track from the plaintiff's house; that the said Emma went upon the railroad at the point where Main street crossed it, and pursued her way eastward on the track of said railroad in the direction of the school-house, being thus upon that portion of such railroad as was commonly used as a footpath, as above stated; that while the said Emma was so pursuing her way, on said railroad track, an express train, in charge of the defendant's servants, came speeding along; from the west to the east, the track being straight and without obstruction, and the said Emma being in full view of the defendant's said servants in charge of said train for the distance of one thousand feet, but that the said servants of the defendant, wholly neglecting and refusing to check the speed of said train, or to do anything to avoid a collision with, or injury to, the said Emma, carelessly, recklessly, and wilfully drove said express train at the high and dangerous rate of speed of forty miles per hour through the said town of Bourbon and against the said Emma, thereby killing and destroying her, the said Emma; that, at the time the said train was so run against her, the said Emma was making

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every effort, which, by reason of her immature years and frightened condition, she was capable of making to save herself from injury, which efforts on the part of the said Emma were well known to and observed by the defendant's said servants in charge of said train; that, by reason of the said negligent, reckless and wilful killing of the said Emma, the plaintiff had been made to suffer great mental pain and anguish, had been deprived of the happiness and comfort of her society, and had thereby suffered great damage. Wherefore the plaintiff demanded judgment for ten thousand dollars and for all other proper relief.

It is well settled that, in an action by a parent for the death of his child, he is entitled to recover only for the pecuniary injury he has sustained, and that the proper measure of damages is the value of the child's services from the time of the injury until he would have attained his majority, taken in connection with his prospects in life, less his support and maintenance. To this may be added, in proper cases, the expenses of care and attention to the child, made necessary by the injury, funeral expenses and medical services. 2 Thompson Negligence, 1292; Shearman & Redfield Negligence, sec. 608; 2 Waits' Actions & Defences, 477; Cooley Torts, 270; 2 Addison Torts, paragraph 1273; *The Ohio, etc., R. R. Co. v. Tindall*, 13 Ind. 366.

To enable the parent, however, to recover full damages for the services of the child during his minority, such damages must be specially declared for and demanded. This requirement is in accordance with the rules of good pleading, and is recognized as obligatory in the case of *Gilligan v. The N. Y., etc., R. R. Co.*, 1 E. D. Smith, 453, which has become a leading case in actions of the class to which this belongs, and which has been either cited approvingly or followed by many of the text-writers and other decided cases. *Safford v. Drew*, 3 Duer, 627; *Rogers v. Smith*, 17 Ind. 323.

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Counsel for the appellant insist that the complaint was bad, because it did not specially allege loss of services on account of the death of the appellee's child, and that, for that reason, the demurrer to the complaint ought to have been sustained. The complaint ought to have been more specific as to the loss of services resulting from the death of the child, but we can not hold that it was not good as a demand for some loss of services. On the contrary, we think a fair construction of the facts alleged in it constituted the complaint a good demand for loss of services from the time of the death of the child until the commencement of this action, a period of a little more than five months. Accepting this construction of the complaint, it was correctly held to be sufficient upon demurrer.

Error is also assigned upon the refusal of the court to grant a new trial.

Counsel for the appellant further insist that the damages were excessive, and that a new trial ought to have been granted for that cause, if for no other. There was no evidence tending to show any loss of services to the appellee, except what might have been inferred from the age of the child, her relationship to the appellee, and the circumstances attending her death. Considered with reference to the evidence, and to the fact that the complaint did not constitute a demand for the loss of future services of the child, we are of the opinion that the damages were excessive, and that the court erred in overruling the motion for a new trial. As to the evidence necessary to make out a case for damages for loss of services, in a case like this, the reader is referred to 2 Thompson Negligence, 1,289, note 90.

As this cause will have to be returned to the court below for another trial, we express no opinion upon other questions presented upon the evidence. *The Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297; *Gann v. Worman*, 69 Ind. 458.

The judgment is reversed, with costs, and the cause remanded for a new trial.

Cook v. The Citizens National Bank.

No. 7861.

COOK v. THE CITIZENS NATIONAL BANK.

CONTEMPT.—Receiver.—Collateral Attack.—Mortgage.—Growing Crop.—Pleading.—Practice.—On report of a receiver appointed in an action to foreclose a mortgage on real estate, proceedings were instituted against A. for contempt in refusing to yield possession of the wheat ready to be cut, growing on the mortgaged land. A. answered, besides denying that such receiver had ever qualified, that he had not resisted said receiver, but that, on his failure to take possession, he had, under the employment of B., who had actual possession of the wheat under a chattel mortgage made prior to the commencement of the foreclosure suit, and who was not a party thereto, harvested and marketed said wheat, intending no contempt, etc.

Held, that, if the appointment of a receiver was erroneous, it was not void, and could not be collaterally attacked.

Held, also, that A. was not in contempt.

Held, also, that the sufficiency of the complaint in the foreclosure suit can not be questioned collaterally.

SAME.—Appeal.—Interlocutory Order.—Under section 576 of the code, an appeal to the Supreme Court may be had from an order to bring money into court.

From the Hendricks Circuit Court.

E. G. Hogate and *R. B. Blake*, for appellant.

L. M. Campbell, for appellee.

WOODS, J.—On the 10th day of June, 1878, the appellee obtained in the Hendricks Circuit Court a decree of foreclosure of a mortgage of real estate in said county, against Joseph L. Cook and wife and Martha Kinkead, and, in connection with the decree, an order appointing James W. Thompson a receiver in said cause, and directing him to take possession of said lands and receive and collect the rents and profits, and hold the same, subject to the order of said court, to be applied upon the plaintiff's debt, if said lands should fail to sell for the full amount thereof. This decree was rendered upon default, after due service of process, and in accordance with the prayer of the complaint.

On the 23d day of January, 1879, said Thompson, as re-

73	256
135	680

73	256
152	284

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ceiver, made his report to said court under oath, showing an attempt, on his part, to take possession of said mortgaged lands and the growing crops thereon, consisting of wheat just ready to cut, and growing corn, and that the defendant Joseph L. Cook had abandoned said land and crops; but that one Samuel Cook, in defiance of the receiver and the order of the court, refused to yield the possession of the wheat, but had cut and threshed and hauled the same out of the county, to the value of \$160, one-half of which was due and belonging to said Joseph L. Cook; that said receiver had realized only nine dollars from the proceeds of said land; and that there is about \$100 and interest due the plaintiffs, over the amount for which said land sold; and that there is no property or assets now to be had by the receiver. Wherefore he submits this report to the court, for the direction and action of the court, with reference to the interference of said Samuel Cook.

Thereupon the court entered a rule against said Samuel Cook to show cause why he should not be punished as for contempt of said court; and on January 29th, 1879, said Cook filed a sworn answer, setting forth the said order of appointment of said receiver, the subsequent issue of a copy of said decree to the sheriff, whereby, on the 10th day of August, 1878, said real estate was sold; that said Thompson never qualified or gave bond as such receiver, nor was any copy of his appointment ever issued to him, showing his authority to act; that said Joseph L. Cook had in cultivation on said land about eighteen or twenty acres of wheat, which, on the 16th day of January, 1878, he mortgaged to Marion Porter, by chattel mortgage, which was duly recorded on the 24th of January, 1878; that, on or about May 30th, 1878, said Joseph L. Cook left this State and moved to Kansas, turning said wheat over to said Porter under said mortgage; that affiant gathered said field of wheat, mentioned in the report, but as the agent of said Porter, who was entitled to, and had, actual possession of said field by virtue of said

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mortgage, at the time he so harvested the same ; that, a few days before July 3d, when affiant commenced to harvest said wheat, said Thompson came to affiant, where he was in his own field, and inquired concerning the field in controversy, and affiant notified him of his employment by Porter to cut said wheat, when said Thompson, without showing any authority, informed affiant that he was receiver to collect the rents and profits of said real estate, and was going to take half of said wheat, whereupon affiant told him if he had any interest in said wheat to take and cut the same, and that he, affiant, would have nothing to do with it ; that said Thompson then went away and returned no more, and affiant, under his employment from said Porter, cut said wheat and took care of the same as aforesaid ; that, at that time, affiant had no actual notice that said Thompson had been appointed receiver as aforesaid, having only Thompson's statement to that effect ; that the above conversation is the only thing done or said by him to the hindrance of said receiver, if he was such, in the discharge of his duties ; and affiant says that he intended no contempt, etc., and he asks to be discharged. Thereupon the court ordered said Samuel to report the proceeds of the wheat, mentioned in his answer, to the court on or before the first day of the ensuing March term, to which order the appellant excepted at the time.

At the next term of the court, on the 11th day of March, 1879, the appellant, on oral examination, answered that the gross proceeds of said wheat were \$198.75, but the net sum realized, over the expense of cutting and marketing, was \$74.20. Thereupon the court ordered "that said Samuel Cook pay into court \$74.20, together with the costs of this proceeding," to which order the appellant excepted, and prayed an appeal therefrom, which appeal was duly perfected.

By the first to the sixth assignment of errors, inclusive, the appellant seeks to question the sufficiency of the complaint in the foreclosure suit to warrant the appointment of a receiver.

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The appellant was not a party to that action, and can not, in the prosecution of his appeal from the order made against him be allowed to assign error on the record of the foreclosure suit. Whether the action of the court in appointing a receiver was according to law, we need not decide. If the appointment was erroneous, it was not void, and can not, in a collateral proceeding, be assailed, even by the parties thereto, and certainly not by strangers in the attitude of the appellant.

“It is immaterial,” says Kerr on Receivers, p. 166, “that the order appointing a receiver may have been improper or erroneous. It is not competent for any one to interfere with the possession of a receiver on the ground that the order appointing him ought not to have been made. It is enough that it be a subsisting order.”

Other assignments of error bring in question the rulings of the court in requiring the appellant to account for the proceeds of the wheat harvested by him, and in making the order for the payment of said sum of money into court. In these respects the court was in error. The procedure was against the appellant for an alleged contempt of court in refusing to yield to the receiver appointed by the court possession of the wheat, which stood ready to be cut on the mortgaged land, of which the receiver was directed to take possession. The answer of the appellant to the rule to show cause, besides denying that said Thompson had qualified as receiver, showed that the appellant did not resist, but rather encouraged, the said Thompson to take possession, and that, upon his failure to do so, the appellant, under the employment of Porter, who had actual possession under his chattel mortgage, made before the commencement of the foreclosure suit, and who was not a party to that suit, proceeded to harvest and market said wheat, intending no contempt of the court's authority.

Whether the order to bring the money into court was proper, conceding that the appellant was shown to have

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acted in contempt of the court's authority, we need not decide. On the facts stated the appellant was not in contempt.

From Kerr on Receivers we extract the following propositions, which we deem to be pertinent and accurate statements of the law :

“The rents and profits of the estate over which a receiver has been appointed are, as far as respects parties to the suit, bound from the date of the order for the appointment.” P. 164.

“A receiver is entitled to all the rents in arrear at the date of his appointment, and to all the rents which accrue during the continuance of his receivership.” P. 186.

“A receiver duly appointed by the Court of Chancery is, from the date of his appointment, an officer and representative of the court; but he is not legally clothed with that character, nor able to perform its duties until his recognizances are perfected.” P. 157.

“The effect of the appointment of a receiver is to remove the parties to the suit from the possession of the property. If at the time a receiver is appointed, a party claiming a right in the same subject-matter under a title paramount to that under which the receiver, is appointed, is in possession of the right which he claims, the appointment of the receiver leaves him in possession.” Page 158.

“The rule that the possession of a receiver may not be disturbed without leave, does not, however, apply, as far at least as third parties are concerned, until a receiver has been actually appointed, and is in actual possession. It is not enough that an order has been made directing the appointment of a receiver. Until the appointment has been perfected, and the receiver is actually in possession, a creditor is not debarred from proceeding to execution. The order appointing a receiver is for the benefit of parties to the suit. It does not affect third parties until the appointment is completed and perfected.” Pages 168, 169.

The appellee insists there was no final judgment from which an appeal could be had to this court; but, by section

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576 of the code, an appeal is granted from an interlocutory order of the circuit court, "for the payment of money;" and it is settled that an order for the bringing of money into court is within the meaning of the provision. *McKnight v. Knisely*, 25 Ind. 336.

The judgment is reversed, with costs and with instructions to set aside the orders requiring the appellant to account for, and bring into court, the proceeds of the sale of the wheat, and for further proceedings in accordance with the law.

No. 6532.

THE OHIO AND MISSISSIPPI R. W. CO. v. COLLARN.

PLEADING.—Negligence.—Railroad.—Injury to Employee.—Evidence.—A complaint against a railroad company for damages to the person of an employee, charging the negligence by which the plaintiff was injured directly upon the defendant, and not merely upon its employees, is sufficient on demurrer; and proof may be given thereunder of any acts or circumstances of negligence, on the part of such defendant, in the running of the locomotive causing the injury.

SAME.—Practice.—Uncertainty in the allegation of negligence in such complaint is a defect that can not be reached by demurrer, but by motion to make specific.

PRACTICE.—Demurrer to Evidence.—On a demurrer to the evidence, the court is bound to take as true all the facts which the evidence tended to prove, and such inferences from them as the jury could fairly have drawn, though the jury might not have drawn them.

NEGLIGENCE.—When Railroad Company Liable for Injury to Employee by Negligence of Co-Employee.—While a railroad company is not responsible to one employee for an injury resulting from the mere negligence or incompetence of a co-employee, engaged in the same general undertaking, it is liable, in such case, where the company has been guilty of negligence in the employment of, or, after notice, continuing in employment, the negligent or incompetent employee, thereby conducing to the injury.

SAME.—Question of Law and Fact.—Generally, where the facts of a case

73	261
127	150

73	261
128	141

73	261
130	179

73	261
131	433
132	186

73	261
134	22
134	162
134	273
134	467
136	50
136	685

73	261
138	314
139	378
139	442

73	261
140	526
140	660

73	261
146	153

73	261
151	602

73	261
153	630

73	261
156	462

73	261
164	150
164	410

73	261
167	208
167	340

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are undisputed, the effect of them is for the judgment of the court, and not for the decision of the jury, and this is true in that class of cases where the existence of such facts comes in question, rather than where deductions or inferences are to be made from them; but if, from the facts proven, different minds may draw different conclusions, the case may be properly left with the jury.

SAME.—Negligence of Engineer.—Where the engineer of a locomotive places it in the hands of a fireman incompetent to manage it, contrary to the rules of the railroad company in whose employ he is, he is guilty of negligence.

SAME.—A railroad company is guilty of negligence in permitting its order, forbidding firemen to handle its engines, to be violated by its engineers, and retaining them in its employ, after notice of their practice of abandoning their engines to the firemen, which practice led to the placing of an engine in the hands of a careless and incompetent fireman, whereby injury to a co-employee occurred.

SAME.—Notice to Agent.—Notice to Principal.—Notice to the master mechanic of such company, whose duty it was to employ and discharge engineers and firemen, of their practice in violating its orders, is notice to the company.

SAME.—Damages.—Province of Jury.—It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal loss and injuries, and, unless the damages are such as to induce the belief that the jury must have acted from prejudice, partiality or corruption, their verdict ought not to be disturbed.

PRACTICE.—Presumption.—Evidence.—Supreme Court.—If one of two paragraphs of complaint is good, the Supreme Court will presume, on appeal, that the court below, on overruling a demurrer to the evidence, applied the evidence to the good paragraph, and not to the bad paragraph.

From the Washington Circuit Court.

C. A. Beecher and *E. C. Devore*, for appellant.

J. B. Brown, *S. H. Buskirk*, *R. Hill* and *J. W. Nichol*, for appellee.

WORDEN, J.—Complaint by the appellee against the appellant in four paragraphs.

Demurrer for want of sufficient facts to each paragraph; sustained as to the first and second, and overruled as to the third and fourth paragraphs, and exception.

Issue on the third and fourth paragraphs, and trial by jury.

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The defendant demurred to the plaintiff's evidence, and the jury assessed the plaintiff's damages conditionally at \$7,000. The court overruled the defendant's demurrer to the evidence, and the defendant moved for a new trial on the ground that the damages assessed were excessive. This motion was overruled, and judgment rendered for the plaintiff for the damages assessed.

Errors are assigned upon the overruling of the demurrers to the third and fourth paragraphs of the complaint, the demurrer to the evidence, and the motion for a new trial. The following is the fourth paragraph of the complaint:

“Fourth Paragraph. The said plaintiff, William Collarn, for further and additional paragraph of complaint, says that said defendant was and is a corporation duly and legally organized under and by virtue of the laws of the State of Indiana, and was and is engaged in the general carrying on and management of a general railroad business between the cities of Cincinnati, Ohio, and St. Louis, Missouri; that the railroad track of said defendant passes through the city of Seymour, and the county of Jackson, in the State of Indiana, and that on the 22d day of July, 1874, the plaintiff was employed by said defendant as a laborer upon the railroad track of said defendant, and as such it was his duty to assist in the repairing, and keeping in good repair, the railroad track of said defendant; that at the same time the said defendant was managing, operating and running locomotive engines of said defendant, on and along, over and upon the railroad track of said defendant; that plaintiff had nothing whatever to do with the management, running or operating of said locomotive engines of said defendant, nor had he any right, power or authority to give any orders or directions in reference to the running, managing or operating of the same; that, on the day and year last aforesaid, plaintiff was, by said defendant, ordered and directed to work upon the said defendant's railroad track in the city of Seymour,

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Indiana, at repairing the same ; that while said plaintiff was so engaged at work for said defendant, in obedience to the orders and directions aforesaid, the said defendant did then and there, carelessly, negligently and recklessly run a locomotive along and upon the railroad track of said defendant ; that said defendant, by blowing the whistle of said locomotive, could have given plaintiff warning of its approach, and that plaintiff could have been easily notified thereof and warned of the danger, and it was the duty of the defendant so to do, but, not regarding its duty in this respect, it neglected to give plaintiff any notice of the approach of said locomotive, but that said defendant did run said locomotive carelessly, negligently and recklessly, against, on and upon, and over him the said plaintiff, and by means thereof the said plaintiff then and there had his right leg mashed, bruised and cut off. Plaintiff avers that the injury before stated, which he received, was caused without any fault or negligence on his part, and that he was in no wise guilty of contributory negligence thereto. Plaintiff further avers that the aforesaid injury, received by him in the manner and form aforesaid, and by the means aforesaid, was so great, and of such serious character, that he had to employ a physician and surgeon to amputate his said right leg, and to attend upon him for a period of time of six months' duration, the services of whom are of the value of one thousand dollars, for which said plaintiff is liable and bound to pay, and a portion of which he has already paid ; that he was put to great trouble and expense, to wit, the sum of six hundred dollars, in procuring attention and nursing for a long space of time, to wit, six months ; that he was thrown out of employment, by reason of which he has sustained damages in the sum of one thousand dollars. Said plaintiff avers that, by reason of said injury, he suffered great pain, and in consequence of said injury he has become wholly unfitted and unable to prosecute his labor and work, and make a living

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for himself and family. Plaintiff finally avers that, by reason of the foregoing premises, he has sustained damages in the sum of fifty thousand dollars."

This paragraph charges the negligence by which the plaintiff was injured directly upon the defendant itself, and not merely upon its employees, and is good upon demurrer for want of sufficient facts. *The Indianapolis, etc., R. R. Co. v. Keeley's Adm'r*, 23 Ind. 133; *Hildebrand v. The Toledo, etc., R. W. Co.*, 47 Ind. 399.

An allegation of the paragraph is, that "the defendant did run said locomotive, carelessly, negligently and recklessly against, on and upon, and over him, the said plaintiff, and by means thereof," etc. It is not certain from the allegation, in what the alleged carelessness and negligence of the defendant in running the locomotive consisted; but the defect should have been reached by a motion to make the paragraph more specific. *Fultz v. Wycoff*, 25 Ind. 321; *The Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297; *The Brookville, etc., Turnpike Co. v. Pumphrey*, 59 Ind. 78; *The Pennsylvania Company v. Sedwick*, 59 Ind. 336.

There is no hardship in this rule of pleading. Carelessness and negligence in running the locomotive were directly imputed to the defendant, whereby the plaintiff was injured; and, if the defendant had desired a more specific statement of the negligence imputed to it, that end could have been attained by motion.

The mere negligence of a co-employee with the plaintiff, engaged in the same general undertaking, could not be said to be the negligence of the defendant. But the defendant may have been guilty of negligence in knowingly running the locomotive by the agency of careless or incompetent persons. The language of the paragraph is broad enough to admit evidence of this kind. It was said in the case above cited from 47 Ind. 399, that "These are direct charges of negligence against the defendant itself, and are not con-

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finer to the negligence of its servants in killing a co-servant, and are broad enough to admit evidence of all kinds and grades of negligence on the part of the defendant."

Indeed, in holding the paragraph good on demurrer, it is necessarily assumed, that under its general allegations proof may be given of any acts or circumstances of negligence on the part of the defendant, in running the locomotive.

We are of opinion that no error was committed in overruling the demurrer to the fourth paragraph of complaint; and, for reasons hereinafter stated, we have not thought it necessary to consider the third paragraph.

We proceed to consider the question arising on the demurrer to the evidence.

There was evidence tending to prove that the plaintiff, at the time of the injury complained of, July, 1874, was in the employment of the defendant, as a track hand, under the direction and control of Thomas McDonald, an employee of the defendant, and that the plaintiff had been in such employment ten or twelve years; that it was the custom of the defendant, upon the arrival of the morning train from Cincinnati, at Seymour, to change engines at the latter place, leaving the one just arrived with the train at that place, and taking a fresh engine for the continuance of the route west; that the engine to be left, in order to reach the round-house, had to back over some portion of the track that needed new rails; that, on the morning of the day of the injury, McDonald directed the plaintiff and some other hands to make preparations for taking up five old rails, at the place indicated, and replacing them with new, so that the work might be done by noon, and for this purpose he directed them, as soon as the train should arrive from Cincinnati, and before the engine should back up to go to the engine-house, a space of time usually of fifteen or twenty minutes, and sometimes more, to go to work and unscrew some of the bolts to the fish-plates fastening the ends of the rails together, so that

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the rails might be taken up and replaced soon after the engine should pass back to the round-house ; that, in obedience to these directions, and before the engine had passed back, the plaintiff and the other hands went to work loosening the bolts and getting ready to remove the rails as soon as the engine should have passed back ; that while the plaintiff was thus at work, in a stooping posture, with his face to the east and his back to the approaching engine, it backed up and run over and crushed his leg, about midway between the knee and ankle joints, making amputation above the knee necessary ; that the engine backed up with a speed of from six to twelve miles an hour, without the ringing of a bell or the sounding of a whistle ; that, as the engine was backing up, there was a freight train slowly moving out in the opposite direction, on a track near by ; that the distance from the point where the engine started to back to the point where the plaintiff was struck was three or four hundred yards, with a slightly up-grade ; the track was straight, and there was nothing to prevent the person running the engine from seeing the plaintiff at work upon the track, nor was there anything that prevented the plaintiff from seeing the engine as it approached, if he had looked in that direction ; McDonald, the superintendent of that work, was near by when the accident occurred, and called out about the time the plaintiff was struck, but gave no other warning ; that, upon the arrival of the train at Seymour, Baker, the engineer, instead of taking the engine to the engine-house, entrusted it for that purpose to one King, his fireman, who was not an engineer, and was not employed by the defendant as an engineer, but only as a fireman, and was not competent to run or take charge of an engine ; that some time before the accident occurred, upon the occasion of an engine being run through the round-house by the carelessness of some one, an order was made by the company not to allow firemen to handle engines, but it was made the duty of engineers to

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place their engines in the engine or round-house, and not leave them to the firemen ; that this order was adopted along in the spring, before the plaintiff was hurt, and continued in force up to that time ; that, notwithstanding this order, it was violated by almost all the engineers, who, upon arrival at Seymour, would leave their engines to the care of the firemen, to be placed in the engine-house ; that the master mechanic of the defendant, at the time of the promulgation of the order of the defendant prohibiting engineers from trusting their engines to firemen, and at the time of its violation by the engineers, and at the time of the accident, and whose province and duty it was, among other things, to employ, retain or discharge engineers and firemen, held his office of business at Seymour, within two or three hundred feet of the point where the engines were exchanged, and was there frequently upon the arrival of trains ; and that, at the time of the injury, the plaintiff had no notice of the habit of the engineers of leaving their engines, upon the arrival of trains, to be taken charge of by the firemen.

“On a demurrer to evidence, everything will be taken against the party demurring which the evidence tends to prove, including every fair inference to be drawn from the evidence.” *Eagan v. Downing*, 55 Ind. 65.

“By a demurrer to evidence, all the facts of which there is any evidence are admitted, and all conclusions which can fairly and logically be deduced from those facts.” *Newhouse v. Clark*, 60 Ind. 172.

Applying the law to the case made by the evidence, we may observe, that, while a railroad company is not responsible to one employee for an injury resulting from the mere negligence or incompetence of a co-employee, in the same general employment, it is liable, in such case, where the company has been guilty of negligence, in the employment of, or, after notice, continuing in employment, the negligent or incompetent employee, thereby conducing to the injury.

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In the case of *The Chicago, etc., R. W. Co. v. Harney*, 28 Ind. 28, this court said, speaking by FRAZER, J.: "Then, again, a master ought to be bound to all the world to employ none but competent and trustworthy servants, so far as reasonable care in their selection can accomplish that end; and if he fails in this, knowing the incompetency or carelessness of those whom he takes into his service, he ought to answer to his other servants for the consequences which may result to them." See, also, *Thayer v. The St. Louis, etc., R. R. Co.*, 22 Ind. 26; *The Pittsburgh, etc., R. W. Co. v. Ruby*, 38 Ind. 294. The rule, to which numerous authorities are cited, is thus stated in 2 Thompson Neg., p. 974, sec. 4 (2): "If the master has failed to exercise ordinary or reasonable care in the selection of his servants, in consequence of which he has in his employ a servant who, by reason of habitual drunkenness, negligence, or other vicious habits, or by reason of want of the requisite skill to discharge the duties which he is employed to perform, or for any other cause, is unfit for the service in which he is engaged, and if, in consequence of such unfitness, an injury happens to another servant, the master must answer for the damages suffered by such servant."

There is some discrepancy in the cases, as to when negligence is a question of law, when of fact, and when compounded of law and fact. The subject is very well elucidated in the case of *Railroad Company v. Stout*, 17 Wall. 657. There, a child of the age of six years had wandered upon the road of the company, and had got his foot crushed by a turntable which had been left unsecured and unguarded. He recovered a judgment of \$7,500 in the circuit court for the District of Nebraska, which was affirmed by the Supreme Court.

Mr. Justice HUNT, in delivering the opinion of the court, said, upon the subject above mentioned:

"It is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the court,

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and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach-driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education

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and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer ; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man ; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge. In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding, in the case before us, that although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence."

If the case before us had gone to the jury, that body would have been authorized to determine, under proper instructions if required, as matters of fact, whether, under the circumstances, the plaintiff was himself free from negligence contributing to his injury, and, also, whether the defendant was guilty of the negligence imputed to it.

The court, on the demurrer to the evidence, was bound to take, as true, all the facts which the evidence tended to prove, and such inferences from them as the jury might fairly have drawn, though the jury might not have drawn such inferences.

Now, it seems to us, from all the evidence, that it may be fairly inferred that the plaintiff himself was free from negligence. He was directed to do the work at the time he was doing it. There seemed to be a reason or necessity for commencing the work before the engine passed back, and he, in obedience to orders, commenced it. His back was toward the engine as it approached him. He had no notice that it

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was in the hands of the fireman, and not the engineer. A freight train was moving out at the same time, the noise of which may have diverted his attention from, and drowned the noise of, the engine as it approached him. He might reasonably have supposed that he would be notified of the approach of the engine, either by the ringing of the bell or the sounding of the whistle.

It needs no argument to show that the engineer was guilty of negligence and a violation of his duty, in placing his engine in the hands of a fireman, and one incompetent to manage it, contrary to the orders of the defendant; or that the fireman was incompetent, or culpably negligent in running the engine as stated, without ringing the bell or sounding the whistle, and apparently without taking the trouble to observe whether he had a clear track, or otherwise.

Now, it may be inferred from the evidence, that the master mechanic of the defendant, whose province it was to employ and discharge engineers and firemen, had ample notice of the practice of the engineers of violating the order of the defendant, by placing their engines in the hands of the firemen; and that the practice led to the placing of the engine in question in the hands of a fireman, incompetent and unfit to manage it. Yet the inference is that no stop was put to the practice, nor were any engineers discharged in consequence of it. Notice to the master mechanic, clothed by the company with such powers, was notice to the company, and his act in thus permitting the order to be violated, and the engineers to thus consign their engines to the firemen, must be deemed the act of the company. This view is fully sustained by the authorities.

In the case of *The Pittsburgh, etc., R. W. Co. v. Ruby*, 38 Ind. 294, 322, DOWNEY, J., speaking for the court, said: "We think that notice to an agent of a corporation, relating to any matter of which he has the management and control, is notice to the corporation, and we do not see any reason

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why this rule is not applicable here. * * * As it was the duty of the master of transportation to communicate all matters concerning his agency to his principal, it may be presumed that he did so. But, whether he did so or not, notice to him is notice to his principal, when it relates, as it did here, to the business which he was transacting for the company. He was placed in his position that he might make himself acquainted with the conduct of those who were placed under his direction and control, and he seems to have had the power to appoint and remove, promote and degrade, those who were engaged in the business of which he had oversight."

In *Baulec v. The New York, etc., R. R. Co.*, 59 N. Y. 356, it is said that, "when the master is a corporation, necessarily acting by and through agents, the acts of its general agents charged with the employment and discharge of servants, in the performance of that duty, must be regarded as its acts. The corporation should be regarded as constructively present in all acts performed by its general agents within the scope and range of their ordinary employment."

The case of *Harper v. The Indianapolis and St. Louis R. R. Co.*, 47 Mo. 567, S. C., 4 Am. Rep. 353, was, in many of its features, much like the present. See, also, 2 Thomp. Neg. 1,028, sec. 34; *Patterson v. Pittsburg, etc., R. R. Co.*, 76 Pa. St. 389, S. C., 18 Am. Rep. 412.

It is clear enough, from the evidence, that the defendant was guilty of negligence, in permitting its order, above mentioned, to be violated by its engineers, and in retaining them in its employment, after notice of their practice of abandoning their engines to the firemen, which led to placing the engine in question in the hands of a careless fireman, incompetent to manage it, whereby the injury to the plaintiff occurred. The company may well be said, in general terms, to have been careless and negligent in running the engine, by means of the careless and incompetent person thus placed in

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charge for that purpose. No error was committed in overruling the demurrer to the evidence.

We do not feel authorized to disturb the judgment on the ground that the damages assessed were excessive.

What was said by KENT, C. J., nearly seventy years ago, in the case of *Coleman v. Southwick*, 9 Johns. 45, on p. 51, is as much the law now as it was then. He said: "The question of damages was within the proper and peculiar province of the jury. It rested in their sound discretion, under all the circumstances of the case, and unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption, we can not, consistently with the precedents, interfere with the verdict. It is not enough to say, that in the opinion of the court, the damages are too high, and that we would have given much less. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal torts and injuries."

Considering the physical and mental suffering which the plaintiff must have endured, and the dismembered condition in which he must pass the residue of life, together with the chances of his general health being impaired and his life shortened by the accident, we can not say that the damages were excessive.

There remains but one further point to be considered, which relates to the ruling of the court on the demurrer to the third paragraph of complaint. We think it entirely immaterial whether that paragraph was good or bad; and, if bad, that no harm was done the defendant by the ruling on the demurrer. That paragraph might be entirely eliminated from the record, and the judgment be sustained. Conceding the paragraph to be bad, no verdict was found upon it, nor does the judgment necessarily rest upon it. If the jury had passed upon the evidence, they might have found for the

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plaintiff on the fourth paragraph only ; and, in that event, the ruling on the demurrer to the third would have been of no importance, and could have done no harm. The jury, had they passed upon the matter, might well have found for the plaintiff on the fourth paragraph, for the evidence warranted such verdict. If the third paragraph was not good, it may be presumed that the court below, on overruling the demurrer to the evidence, applied the evidence to the good paragraph, and not to the bad one.

The case is entirely unlike those where there are several paragraphs of complaint, some good and some bad, but all held good on demurrer, and there is a general verdict for the plaintiff, and nothing in the record to show that it was based on the good paragraphs. See *Schafer v. The State, ex rel.*, 49 Ind. 460 ; *The Pennsylvania Company v. Holderman*, 69 Ind. 18, and cases there cited. In such cases the court can not say that the error in holding the bad paragraphs good was harmless, because it can not say that the evidence supported and made out the good paragraphs, and entitled the plaintiff to verdict and judgment thereon, as if the bad paragraphs had not been in the record ; all of which appears in the case before us.

The judgment below is affirmed, with costs.

It having been made to appear that since the submission of this cause, the appellee has departed this life, it is ordered that the judgment herein be rendered as of the term at which the cause was submitted.

No. 6871.

BAILEY ET AL. v. MCCLURE.

PROMISSORY NOTE.—*Construction of.*—A promissory note, drawing ten per cent. interest, contained the stipulation that if the makers should pay the same before it becomes due, which they have the privilege of

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doing at any time, ten per cent. per annum is to be deducted from the amount of said note for the unexpired time thereof."

Held, in an action thereon, that the maker had reserved the right to take up the note at any time by paying the principal sum named in it, together with the interest due at the time of payment, deducting only the ten per cent. interest per annum which would otherwise thereafter accrue upon the note.

Held, also, that "the amount of said note" meant the gross sum due upon it, both principal and interest.

From the Montgomery Circuit Court.

P. S. Kennedy, W. T. Brush, W. P. Britton, M. W. Bruner, G. W. Paul and J. E. Humphries, for appellants.
J. McCabe, for appellee.

NIBLACK, J.—Complaint by Isabel McClure against Archelaus Bailey and John Bailey, to obtain judgment on a promissory note, and to foreclose a mortgage executed to secure the payment of the note. The note was as follows:

"April 20th, 1876.

"Six years after date we promise to pay to the order of Isabel McClure the sum of twenty-five hundred dollars, value received, without any relief from valuation or appraisement laws of the State of Indiana, bearing ten per cent. per annum from date, payable annually. In case of failure to pay interest when due, this note is to fall due and become payable at once. If the makers of this note should pay the same before it becomes due, which they have the privilege of doing at any time, ten per cent. per annum is to be deducted from the amount of said note for the unexpired time thereof.

"ARCH. BAILEY.

"JOHN BAILEY."

The defendants answered, that on the 10th day of May, 1876, desiring to pay the note, in accordance with the privilege reserved to them of doing so at any time, they tendered to the plaintiff the sum of twelve hundred dollars, in full payment of said note, which sum of money the plaintiff had

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refused to accept. That sum of money was brought into court for the use of the plaintiff.

The court sustained a demurrer to the answer; and, the defendants declining to answer further, judgment was rendered against them for the full face of the note, with the sum of four hundred and sixteen dollars and sixty-six cents superadded for interest then due, and for a foreclosure of the mortgage.

The only error assigned is upon the decision of the court sustaining the demurrer to the answer. The appellants contend that, by the last clause of the note, the right was reserved to them to take up the note at any time, after its execution, by paying to the appellee the sum which would be found to remain after deducting ten per cent. per annum from the face of the note, that is, from the principal secured by it, and that, in consequence of the right thus reserved to them, twelve hundred dollars was more than sufficient to pay the note at the time of the tender of that sum to the appellee. But we can not agree to the construction of the note thus contended for. In common parlance, the "amount of a note" means the gross sum due upon it, both principal and interest, and we think the words, "the amount of said note," contained in the concluding portion of the note, were used in that sense.

The construction we place upon the last clause of the note is, that the appellants had reserved to them the right to take up the note at any time, by paying the principal sum named in it, together with the interest due at the time of payment, deducting only, and counting off, the ten per cent. interest per annum, which would otherwise thereafter have accrued upon the note. Any other construction, it seems to us, would do violence to the manifest intention of the parties to the note, and to the evident purpose for which the note was executed. We see no error in the record.

The appellees ask us to assess damages against the appel-

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lants upon an affirmance of the judgment, but, as the judgment bears interest at the rate of ten per cent. per annum, we regard that as a reasonably sufficient penalty for the delay occasioned by this appeal.

The judgment is affirmed, with costs.

No. 7990.

THE CAIRO AND VINCENNES R. R. CO. v. STEVENS.

DAMAGE.—Surface Water.—Obstruction of.—Watercourse.—The owner of land may, upon the boundaries thereof, not interfering with any natural or prescriptive watercourse, erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands; and for any consequent repulsion, turning aside or heaping up of these waters to the injury of other lands, he is not responsible; but such waters as fall in rain and snow upon his lands, or come thereon by surface drainage from or over contiguous lands he must keep within his boundaries, or permit them to flow off without artificial interference, unless within the limits of his land he can turn them into a natural watercourse.

From the Daviess Circuit Court.

S. P. Wheeler, W. H. De Wolf and S. N. Chambers,
for appellant.

H. D. McMullen and D. T. Downey, for appellee.

WOODS, J.—This suit was commenced in the Knox circuit court, and the venue changed to Daviess county, where a trial was had, resulting in a judgment for the plaintiff below, from which the defendant prosecutes this appeal.

The complaint contains but one paragraph, and alleges that the plaintiff, on the 1st day of January, 1872, was, and ever since has been, the owner of certain lands therein described, situated in the lower prairie below Vincennes,

73	278
124	316

73	278
152	125

73	278
164	444

73	278
168	212

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containing about two hundred acres. After the description of the lands, the complaint proceeds in the following words: "And the plaintiff further avers that the defendant, in the year 1872, built and constructed a large embankment of earth and stone and gravel, ten feet high and one hundred feet wide, over and across the southern portion of the said land hereinbefore described, and that said embankment extended from the north line of said land, southwardly across said land and for a distance of ten miles south of the south line of said land, and the plaintiff says that the natural flow and drainage of the said land was over and across the land upon which the said embankment is now constructed, and also over and across the land lying immediately south of the land herein described, and from thence across and over the land now occupied by said part of said embankment south of the land hereinbefore described; and the plaintiff says that the defendant carelessly, negligently and unskilfully built and constructed said embankment, and failed negligently and carelessly, in the construction of said embankment, to make any culvert, bridge or drain, in, through or under said embankment, whereby the water coming on the land hereinbefore described could escape, and the plaintiff says that within five years last past, the water falling upon the said real estate of the plaintiff, and the water flowing thereon from the river, and from the surrounding land, has been stopped and hindered by said embankment from flowing off of said land, and during the month of August, 1875, the water being so stopped and hindered arose to the depth of eight feet upon said land, and entirely destroyed one hundred acres of growing corn, and carried away a thousand panels of fence that enclosed said land, and that, since the time of the construction of said embankment, the water has continually overflowed the said land, so that the same has become almost entirely worthless, and the plaintiff says that the said embankment was and is

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the only cause of the water so overflowing the plaintiff's land. Wherefore the plaintiff demands judgment," etc.

The complaint proceeds on the theory that the defendant was lawfully in possession of its right of way across the land described and for the distance of ten miles southward, but whether by condemnation or by purchase is left to conjecture. The defendant was therefore guilty of no trespass in entering upon its said right of way, and in making all proper and necessary excavations and embankments for the construction of its road-bed. The gist of the complaint is in the averments that the defendant "failed negligently and carelessly, in the construction of said embankment, to make any culvert, bridge or drain, in, through or under said embankment, whereby the water coming on the land hereinbefore described could escape, and that within five years last past the water falling upon said real estate of the plaintiff, and the water flowing thereon from the river, and from the surrounding land, has been stopped and hindered by said embankment from flowing off," etc. No attempt is made to charge an interference with any natural watercourse, but only with the flow of surface water and waters overflowing from the river and spreading over the adjacent bottom or low lands. The question presented is, therefore, whether the defendant, having acquired a right of way for the construction of its railroad, and having found it necessary or expedient to raise its track above the natural surface of the land, owed any duty to the plaintiff to provide culverts or other means of passage through its embankment, for the surface water or water overflowing from the river and descending in that direction from or over the lands of the plaintiff. If upon the facts of the complaint such duty existed, a careless and negligent breach thereof, together with actionable damages, is shown, and the complaint is good. If such duty did not exist, the complaint is not good.

Washburn, in his work on Easements and Servitudes, pp.

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353 and 355, supporting himself mainly by references to writers on the civil law, says: "It may be stated as a general principle, that, by the civil law, where the situation of two adjoining fields is such that the water falling or collected by melting snows, and the like, upon one, naturally descends on the other, it must be suffered by the lower one to be discharged upon his land, if desired by the owner of the upper field.

"The owner of the upper field, in such case, has a natural easement, as it is called, to have the water that falls upon his own land flow off the same upon the field below, which is charged with a corresponding servitude, in the nature of dominant and servient tenements."

This is doubtless the rule of the civil law, and has been adopted by the courts of last resort in some of the States of the Union, but it is not the common-law doctrine, and is not generally prevalent in this country.

Dillon, in his work on Municipal Corporations, speaking of the surface water, says: "This the law very largely regards (as Lord TENTERDEN phrases it) as a common enemy, which every proprietor may fight or get rid of as best he may. * * * On the one hand, the owner of the property may take such measures as he deems expedient to keep surface water off from him or turn it away from his premises on to the street; and, on the other hand, the municipal authorities may exercise their powers in respect to the graduation, improvement, and repair of streets, without being liable for the consequential damages caused by surface water to adjacent property." Section 798, and notes. To the same effect are Angell Watercourses, sec. 108; 1 Addison Torts, 105; Cooley Torts, 574; Hillard Torts, 584; *Taylor v. Fickas*, 64 Ind. 167, and cases cited; *Schlichter v. Phillipy*, 67 Ind. 201.

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The case of *Taylor v. Fickas*, *supra*, is fully in point, and must be regarded as having settled the doctrine for this State on the subject. The facts of the case, in brief,

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were, that the owner of the lower land had planted, near the upper line of his land, a row of trees for the purpose of keeping back the driftwood, which was accustomed to be carried on and over his land by the overflow of the Ohio river. The result, which must have been anticipated, and was, therefore, presumably intended, was, that the driftwood, lodging against this row of trees, accumulated on the adjacent land above, and either destroyed or greatly depreciated the value thereof. It was held, however, that no action lay for the obstruction, and citing many of the American, and some of the English, cases on the subject, it was declared that waters percolating the soil, or contained in hidden recesses, without a known channel or course, surface waters, and waters overflowing from contiguous streams or rivers, "fall within the maxim that a man's land extends to the center of the earth below the surface, and to the skies above;" and, citing the case of *Gannon v. Hargadon*, 10 Allen, 106, the following statement of the law was adopted as our own: "The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow. * * * The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil."

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In the more recent case of *Templeton v. Voshloe*, 72 Ind. 134, this court held, "that the owner of the upper field may not construct drains or excavations so as to form new channels on to the lower field, nor can he collect the water of several channels and discharge it on the lower field so as to increase the *wash* upon the same. The right of the owner of the upper field to make drains on his own land is restricted to such as are required by good husbandry and the proper improvement of the surface of the ground, and as may be discharged into natural channels, without inflicting palpable and unnecessary injury on the lower field."

The court, however, took pains to add that, "As to where and under what circumstances, the owner of the lower field may obstruct or direct the flow of surface water which naturally descends upon his land, we need not inquire, as that question is in no way involved in the proper decision of this cause."

It is difficult to invent a formula for the statement of a rule of law which will accurately express the rule in its application to varying circumstances; and it may be that there is some verbal inconsistency in the formulas quoted from these opinions of this court, but when applied to the subject-matter of each there is no inconsistency of principle involved or expressed. The one has to do with the land-owner's conduct in guarding his possession against the encroachments of surface and flood waters from without, and the other with the discharge of such waters from his own land on to that of another. With reasonably near approximation to accuracy, it may be laid down as a general rule, that upon the boundaries of his own land, not interfering with any natural or prescriptive watercourse, the owner may erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands; and for any consequent repulsion, turning aside or heaping up of these waters to the injury of other lands, he will not be

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responsible ; but such waters as fall in rain and snow on his land, or come thereon by surface drainage from or over contiguous lands, he must keep within his boundaries, or permit them to flow off without artificial interference, unless within the limits of his land he can turn them into a natural watercourse. This is in accordance with the general principle, that such waters are a common enemy which each proprietor may fight off as he will ; but, once on his land, they become his property (in a qualified sense, of course), and the maxim applies, “*Sic utere tuo, ut alienum non laedas.*” We hold, therefore, that the complaint fails to show an actionable injury.

Judgment reversed, with costs and with instructions to sustain the demurrer to the complaint.

73	284
129	300
73	284
131	283
131	380
131	412

73	284
135	433
135	557

73	284
137	51
137	50
138	51

73	284
141	16

73	284
144	118

73	284
148	419

73	284
106	496

No. 8151.

OWEN ET AL. v. PHILLIPS ET AL.

PRACTICE.—Motion to Strike out Surplusage.—The Supreme Court will not reverse a case for an erroneous ruling upon a motion to strike out mere surplusage in a pleading.

SAME.—Evidence.—New Trial.—In order to make the admission of irrelevant testimony available as error on appeal to the Supreme Court, objection thereto should be made at the trial, exception taken to the overruling thereof, and such ruling assigned as cause in the motion for a new trial.

INJUNCTION.—Damages.—It is not every injury which will support an action for damages that will entitle the complainant to relief by injunction.

SAME.—Nuisance.—A lawful business may be so conducted as to become a nuisance, but, in order to warrant interference by injunction, the injury must be material and essential.

SAME.—Facts Necessary to Warrant.—In an action by an adjoining property owner, to enjoin the running of a flouring mill, he must show that

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the acts complained of cause him substantial and essential injury, and that a serious wrong is done him thereby. There must be the wrongful invasion of a legal right, and the damage resulting must be serious and substantial. Minor inconveniences must be remedied by action for damages, and not by injunction.

SAME.—*Injury to Property.—Enjoyment of.*—In such action it is not necessary for the plaintiff to prove both an injury to the property itself and an interference with its enjoyment. As a general rule, a lawful business will not be enjoined merely because it diminishes the value of adjacent property.

SAME.—*Civil Action.*—Actions for injunctions are ordinary civil actions, and the rules of evidence therein are not different from those which obtain in civil actions.

SAME.—*Facts Necessary to Authorize Injunction Against Private Nuisance.—Evidence.—Instruction.*—In an application for an injunction against maintaining a private nuisance, the facts relied upon ought to be so weighty, so material and so serious and important in character, as to leave no doubt that they create an actionable nuisance. Yet the court ought not to use any expression in its charge to the jury in such case that will induce the belief that the facts constituting the complainant's cause of action must be proved beyond a doubt.

SAME.—*Locality of Nuisance.*—Whether a thing is or is not a nuisance, does not depend upon the notions of persons living in the particular locality; although a business, in some localities, will be considered a nuisance, which, in another, would not be so considered.

SAME.—*Mills.—Manufactories.—Rights of Adjoining Property Owners.*—While courts interfere by injunction, against establishments such as mills and manufactories, with great caution, and only in cases where the facts are weighty and important, and the injury complained of is serious and permanent in character, yet, wherever a mill or factory may be located, whatever its surroundings, property owners of the vicinity have a right to require that it shall be properly managed, conducted with ordinary care and a proper regard for the rights of others, and so that no unnecessary inconvenience or annoyance shall be caused to them.

From the Posey Circuit Court.

A. P. Hovey and G. V. Menzies, for appellants.

*W. P. Edson, C. Denby, D. B. Kumler, C. A. DeBru-
ler and E. R. Hatfield*, for appellees.

ELLIOTT, J.—Issue was joined upon the complaint of appellants, wherein they charged appellees with maintaining a nuisance, and prayed for an injunction against its continu-

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ance and for an order of abatement. The trial was by jury, and resulted in a verdict and judgment against appellants.

The substantive allegations of the complaint may be thus summarized: Appellants are the owners of a house and lot in the town of New Harmony, which they occupy as their dwelling-house; that on the 26th day of April, 1878, Robinson, Thomas & Co. erected and put in operation a flouring mill, in close proximity to the house of appellants; that the appellees subsequently became the owners of said mill; that on the 20th of December, 1878, the mill was burned; that the appellees threaten to rebuild; that the mill was a nuisance, and that it can not be operated without becoming a nuisance; that the smoke and cinders make the water of appellants' cisterns and wells foul and impure; that the noise, the smoke, dust, dirt, and offensive odors caused by the running of the mill, essentially interfere with appellants' enjoyment of life and property.

A single question is presented upon the pleadings. The court below overruled appellants' motion to strike out part of the answer of the appellees, and of this ruling complaint is made. We can not reverse for an erroneous ruling denying a motion to strike out mere surplusage. The rule of practice upon this subject is now too firmly settled to warrant us in disturbing it, even were we so inclined. *The Baltimore, etc., R. W. Co. v. Pixley*, 61 Ind. 22; *Galvin v. The State, ex rel.*, 64 Ind. 96; *City of Crawfordsville v. Brundage*, 57 Ind. 262; *Mires v. Alley*, 51 Ind. 507; *Rout v. Woods*, 67 Ind. 319. Appellants argue that, as evidence was admitted of the irrelevant matters stated in the answer, there should be a reversal. This question is not in the record. In order to make such an objection available, the parties should, upon the trial, object to the introduction of the evidence, take the proper exception, and by proper assignment among their reasons for a new trial present the ruling for review. This was not done in this case.

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The questions of difficulty are those which arise upon the ruling denying appellants a new trial, and grow out of the giving, modifying, and refusing of instructions.

The seventh instruction asked by the appellants reads as follows: "If the jury find from the evidence that the running and use of said mill lessens the personal enjoyment of plaintiffs, by reason of the noise, smoke, dust, dirt and cinders, in their said dwelling, then the allegations in the plaintiffs' complaint have been sustained."

The eighth instruction, as asked by appellants, was as follows: "If the jury find from the evidence that the personal enjoyment of the plaintiffs in their residence has been and will be lessened, by either the noise, smoke, dust, dirt, cinders, horses, mules or teams, caused by the running and use of said mill, then the allegations of the complaint have been sustained."

Both of these instructions were modified by the court, and, as the modifications are essentially the same, we consider them together. The modification of the seventh instruction consisted in writing after the word "mill," the words "materially and essentially;" the modification of the eighth was made by inserting the words just quoted after the words "has been and will be." Appellants argue that the insertion of these words radically changed the definition of "nuisance." We think otherwise. The relief sought is not the recovery of damages merely, but an injunction restraining appellees from rebuilding their mill and from conducting their business. It is important to keep in mind the fact that the business of milling does not belong to that class which constitute nuisances *per se*. It is also important to sharply mark the distinction between suits for injunction and actions for damages. In the latter class, the remedy is an ordinary one; in the former, the extraordinary powers of the court are invoked. It is not every injury which will support an action for damages that will entitle the complainant to relief by

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injunction. *McCord v. Iker*, 12 Ohio, 387 ; *Rhodes v. Dunbar*, 57 Pa. St. 274 ; *Goodall v. Crofton*, 33 Ohio St. 271 ; *Wallace v. McVey*, 6 Ind. 300 ; *Laughlin v. The President, etc.*, 6 Ind. 223 ; *McQuarrie v. Hildebrand*, 23 Ind. 122 ; *Smith v. Fitzgerald*, 24 Ind. 316. There are solid reasons supporting this rule. A lawful business may be so conducted as to become a nuisance, but, in order to warrant interference by injunction, the injury must be a material and essential one. Damages may be paid by the author of the nuisance and the business not be stopped, but if injunction issues then the right to conduct the business is at an end. The necessity which will authorize the granting of the writ of injunction, to restrain the carrying on of a business lawful in itself, must be a strong and imperious one. If it were otherwise, all mills and manufactories might be stopped at the demand of those to whom they caused annoyance, even though the injury complained of might be slight and trivial. The court did right in modifying the instructions. Several instructions, asked by the appellants, upon the subject of the value of opinions given by witnesses, were refused, and, we think, rightly.

The instruction numbered eight, asked by appellants, was properly refused for the reason that it asserted that if the appellants' property was diminished in value by the running of the appellees' mill, the verdict should be in favor of appellants. This instruction was erroneous for at least two reasons: First, because it does not inform the jury that the diminution in value must be essential and material, and probably continuous ; second, because it does not inform the jury that, although damage may have resulted, there can not be a recovery unless the appellees were shown to have been guilty of some actionable wrong. In all such cases as the present, legal injury and resulting damages must be shown. There must be a concurrence of wrong and damage.

The thirteenth instruction asked by the appellants is as follows: "The right to enjoy pure air is an essential right ; the

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right to enjoy pure water is an essential right ; the right to be undisturbed by unusual noises, day or night, is an essential right, and he who deprives another of either essentially interferes with the enjoyment of life, and can be prevented from so doing by 'injunction under the statute laws of this State.' " The court did not err in refusing to give this instruction. The mere fact that the appellees may have deprived the appellants of the rights enumerated in the instruction did not entitle them to an injunction restraining the appellees from conducting one of the most useful of all the various pursuits of life. There must have been a wrongful deprivation of such rights. The instruction leaves entirely out of consideration the element of culpable wrong. Under the instruction as framed, all interferences, lawful or unlawful, with the property of another, would supply grounds for relief by injunction. The law recognizes no such doctrine.

The ninth instruction, given at the request of the appellees, is as follows: "The relief given by the remedy of injunction, against a useful manufactory or business which is properly managed, is never granted in a case of doubt, but only upon a case clearly made out, where the injury or annoyance complained of is not only a violation of the plaintiff's rights, but such a violation as is, or will be, attended with substantial, serious or irreparable damage, or essentially interferes with their comfortable enjoyment of property."

This instruction was erroneous. The jury must have inferred from the language used, that it was incumbent upon the appellants to prove their case beyond a reasonable doubt, for this is the plain and obvious meaning of the first branch of the instruction. In applications for injunctions, the character of the facts relied upon as constituting the nuisance must be such as clearly and fully establish the existence of the nuisance, but the degree of evidence required to prove the existence and character of such facts is not that asserted in the instruction under examination. Actions for injunc-

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tions are, under our code, ordinary civil actions, and the rules of evidence are not different from those which ordinarily obtain in such actions. There is no authority for applying to actions for injunctions a rule of evidence which, with extremely rare exceptions, applies only to criminal prosecutions. The error in this instruction is in instructing the jury that "an injunction is never granted in a case of doubt, but only upon a case clearly made out." Coupling these two clauses together, the meaning conveyed is that the evidence must make out a case free from doubt. Expressions similar to that used in the instructions are found in the books and reports, not, however, as applying to rules of evidence for the guidance of juries, but to the character of the acts or facts relied upon as constituting the nuisance. The facts which are relied upon ought to be so weighty, so material and so serious and important in character, as to leave no doubt that they do create an actionable nuisance, or the injunction should be denied. Where, however, as with us, actions for injunctions are triable by a jury as matter of right, there ought not to be any expression used in the charge of the court which will induce the belief that the facts constituting the complainant's cause of action must be proved beyond a doubt.

In another instruction the jury were told that, "In proceedings to enjoin a useful manufactory or business in a town, when it is properly managed, the jury should proceed with extreme caution, and weigh the rights of the parties with exceeding care, and never declare such a manufactory or business a private nuisance, except there be such essential injury that the act or thing complained of can not be justly tolerated without doing violence to the rights of individuals." It may be that some of the terms used in this instruction are justly amenable to the censure which appellants' counsel bestow upon them, but the doctrine declared is substantially correct. A lawful and useful business is not

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to be destroyed by injunction unless the necessity for doing so be strong, clear and urgent. He who asks the intervention of the court in such a case must show that the acts complained of do cause him substantial and essential injury, and that there is a grave and serious wrong done by the person against whom the complaint is lodged. There must be the wrongful invasion of a legal right, and the damage resulting must be serious and substantial. The rule upon this subject is well illustrated and enforced in *Gilbert v. Showerman*, 23 Mich. 448. It was there said by COOLEY, J., in delivering the opinion of the court, that: "We can not shut our eyes to the obvious truth that if the running of this mill can be enjoined, almost any manufactory in any of our cities can be enjoined upon similar reasons. Some resident must be incommoded or annoyed by almost any of them. In the heaviest business quarters and among the most offensive trades of every city, will be found persons who, from motives of convenience, economy or necessity, have taken up there their abode; but in the administration of equitable police, the greater and more general interests must be regarded rather than the inferior and special. The welfare of community can not be otherwise subserved and its necessities provided for. Minor inconveniences must be remedied by actions for the recovery of damages rather than by the severe process of injunction." Courts interfere by injunction against establishments such as mills and manufactories, with great caution, and only in cases where the facts are weighty and important, and the injury complained of is of a serious and permanent character. *Cooke v. Forbes*, L. R., 5 Eq. Cas. 166; *Goodall v. Crofton*, 33 Ohio St. 271; *Harrison v. Good*, L. R., 11 Eq. Cas. 338; *Barnes v. Calhoun*, 2 Ired. Eq. 199; *Eason v. Perkins*, 2 Dev. Eq. 38; *Green v. Lake*, 54 Miss. 540; *Duncan v. Hayes*, 7 C. E. Green, 25; *Adams v. Michael*, 38 Md. 123; *Huckenstine's Appeal*, 70 Pa. St. 102.

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The twelfth instruction given by the court, upon the request of the appellees, is as follows :

“12. In this case, if the steam mill of the defendant Harriet M. Phillips is used for manufacturing flour and meal, in the town of New Harmony, and is properly managed, then, to authorize an injunction against the same as a private nuisance, the coal smoke, offensive smell, dust, dirt, noise or confusion, complained of as arising therefrom, one or all, must be sufficiently excessive and frequent as to constitute a grievance ; or the danger of fire complained of must be a present, actual or reasonably certain danger, and not a mere contingency, which may never happen ; and such danger of fire must be more than that which merely increases the rate of insurance on the plaintiffs’ dwelling-house. *Also, in addition to this, from all the causes complained of, or from some one of them, there must be an injury to such dwelling-house itself, which amounts to something more than a slight diminution in the value thereof, or which can not be compensated in damages ; or from all the causes complained of, or from some one of them, there must be a sensible and material annoyance to the plaintiffs and their families in the occupancy of such dwelling-house, amounting to something more than a mere personal discomfort, which is fanciful or may arise from mere delicacy or fastidiousness ; for the personal discomfort to the occupants of such dwelling-house, which would justify such injunction, must be an annoyance which essentially interferes with the ordinary comfort, physically, of human existence ; or, in other words, it must be annoyance which renders such dwelling-house materially less suitable for habitation, by persons in average health, or ordinary tastes and sensibilities, not merely according to elegant and dainty modes and habits of living, but according to the notions of ordinary classes living in that locality.*”

This instruction was clearly erroneous. It imposed a burden upon the appellants greater than the law warranted.

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The jury are instructed by it that there can be no recovery unless the appellants shall have proved, in addition to the facts enumerated in the first part of the instruction, that there was an injury to the dwelling-house itself. This is the plain meaning of that portion of the instruction which we have italicized. The words with which the clause, "there must be an injury to such dwelling-house itself," are prefaced, are the strongest that could well have been employed. The terms, "Also, in addition to this," imperatively declared that, not only must the things enumerated in the preceding part of the instruction be proved, but so, also, must be that named in that part of the instruction which followed. The appellants were not bound to prove every allegation of their complaint; it was sufficient if they established the substance of the issue, and this might well have been done without proving the slightest injury to the house itself. Appellants were not bound to prove an injury to the house, in addition to the things enumerated in the introductory part of the instruction. The house might have stood as perfect in all its parts, and as free from injury, as it was the day it was built, and still the appellants have had ample cause for injunction. If the dust, dirt, smoke and offensive odors essentially interfered with the comfortable enjoyment of the house, or if the danger from fire was real, present and imminent, the action might be maintained, although not a penny's value of injury was done to the house itself.

The instruction is obscure and confused. The jury may well have understood it to mean that, in addition to proving a wrongful and serious interference with the enjoyment of their property, the appellants were also bound to prove injury to the house itself. If this be the meaning the instruction is radically wrong. The right of appellants was not merely to have their house protected from wrongful injury, but they had the further right to be protected in its comfortable enjoyment. Noises, odors, smoke and dust may possibly work the house itself

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no material injury, and yet render it impossible for the owners to live in it with comfort. The appellants were not bound to prove both an injury to the property itself, and an interference with its enjoyment. In requiring the appellants to prove both the material facts enumerated in the introductory part of the instruction, and an injury to the house itself, as the instruction clearly does, the court was plainly wrong.

It is true, as a general rule, that such acts as result in a mere diminution in value of property, which can be fully and readily compensated in damages, will not supply grounds for an injunction, and parties will be left to the redress afforded by an action for damages. But, while this is true, it by no means follows that interference with the enjoyment of the property will not furnish grounds for relief by injunction, although the property itself may sustain no physical injury whatever. The right to enjoy property is as much a matter of legal concern as the property itself. While, as we have indicated, we assent to the doctrine insisted upon by appellees, that, as a general rule, a lawful business will not be enjoined merely because it diminishes the value of adjacent property, we do not mean to be understood as holding that such an element is not proper in considering an application for injunction. Nor do we mean to hold that, where the act is wrongful, and the injury flowing from it continues, an injunction will not be granted. We recognize as sound those cases which hold that, where it is necessary to prevent a multiplicity of actions, injunctions will lie, although the only injury resulting from the wrongful acts is pecuniary loss. 2 Story Eq. Jur., sec. 925 ; 1 High Injunctions, sec. 739.

The last clause of the instruction under examination gives a controlling force and meaning to the whole of the instruction, and makes it declare an erroneous doctrine. Whether a thing is or is not a nuisance does not depend upon the notions of people living in a designated locality. It was

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proper to tell the jury, as was done substantially in the language of an English case, that the question of nuisance or no nuisance did not depend upon whether the acts complained of caused discomfort to persons of elegant and dainty modes and habits of living, but it was wrong to make the question turn upon the notions of the people of the locality. The owner of property is entitled to enjoy the ordinary comforts of life, and that right is not to be measured by the notions of the people of a particular locality. It might happen that the persons living in the locality were those who cared nothing for noxious odors, offensive stench, or for impurities fouling the waters of wells and cisterns, and it would, in such a case, be unjust to allow their notions of what constitutes reasonable comfort to control the rights of property owners, whose modes of life and whose regard for fresh air, pure water and decent cleanliness were those of the ordinary class. On the other hand, if the people of the locality were of that fastidious, dainty class, whose over-nice tastes and delicate sensibilities exacted more than the ordinary comforts of life, it would be unjust to allow their exacting tastes and high demands to furnish the rule which should determine whether a given business was or was not a nuisance. No man has a right to take from another the enjoyment of what are regarded by the community as the reasonable and essential comforts of life, because the notions of the people of a given locality may not correctly estimate the standard of such comforts.

We are not unmindful of the rule that locality is sometimes an important element in determining whether a business is or is not a nuisance, and we have no disposition to run counter to that rule. If one erects a dwelling-house among mills and factories propelled by steam, which have been long established, he must expect to suffer the ordinary inconveniences and annoyances which are inseparable from such establishments. We approve, in its fullest extent, the

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(doctrine, that in some localities a business will be considered a nuisance, while it would not be so in others.) But wherever the mill or factory may be located, whatever its surroundings, property owners of the vicinity have a right to require that it shall be properly managed, conducted with ordinary care and proper regard for the rights of others, and in such a way as that no unnecessary inconvenience or annoyance shall be caused them.

Judgment reversed, at the costs of the appellees.

No. 7109.

THE WATSON COAL AND MINING CO. v. CASTEEL.

73	296
149	50
73	296
150	347

PLEADING.—*Complaint.—Variance.*—In a suit upon a written instrument, where there is a material variance between the copy filed and the allegations of the complaint, the copy will control.

CONTRACT.—*Mining Lease.—Construction of.*—Where, in a lease for mining coal, the lessees agreed to sink a shaft upon the demised land and to mine coal within one year from the date of said lease, or, in default thereof, to pay the lessor the sum of one hundred dollars per month until such shaft should be put into operation; and further, that they would mine sufficient coal, that the royalty thereon, at twenty-five cents per ton, should amount to the sum of twelve hundred dollars, and in default thereof they agreed to pay said sum, without having so mined, payable in monthly instalments; and it was agreed that all payments of one hundred dollars were to apply on the payments of rent or royalty.

Held. that the first covenant of the lease bound the lessees to sink a shaft, and to mine coal within one year, and, if they made default, they were bound to pay the lessor, in the nature of a penalty, one hundred dollars per month.

Held. also, that, under the second covenant, the lessees were bound to pay one hundred dollars per month, in any event, after they had sunk the shaft and were mining coal, and to pay a royalty of twenty-five cents per ton, but that if the royalty should amount, in the aggregate, to more than twelve hundred dollars, the minimum of one hundred dollars per month should be applied in payment of such aggregate sum.

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EVIDENCE.—Presumption.—Where the record fails to disclose the object or purpose for which excluded evidence is offered, the Supreme Court will presume, in favor of the ruling of the court below, that the evidence was properly excluded.

From the Clay Circuit Court.

D. E. Williamson, A. Daggy, G. A. Knight, C. H. Knight, N. B. Taylor, F. Rand and E. Taylor, for appellant.

W. W. Carter and S. D. Coffey, for appellee.

Howk, C. J.—In this action the appellee, as lessor, sued the appellant, as the assignee of the lessees in a certain mining lease, to recover certain rents or royalties alleged to be due and unpaid under said lease. The appellant's demurrer to the appellee's complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, was overruled by the court, and to this ruling the appellant excepted. The trial of the cause by a jury, after the same had been put at issue, resulted in a verdict for the appellee, assessing his damages in the sum of fourteen hundred dollars; and the appellant's motion for a new trial having been overruled, and its exception saved to this decision, the court rendered judgment on the verdict.

Errors have been assigned by the appellant, in this court, which call in question the sufficiency of the facts stated in appellee's complaint to constitute a cause of action, and the correctness of the decision of the trial court in overruling the motion for a new trial.

The controlling question for the decision of this court, as it seems to us, is this: Does the appellee's complaint state facts sufficient to constitute a cause of action? In his complaint the appellee alleged, in substance, that, on the 23d day of August, 1873, he, the appellee, executed to Benjamin F. Masten, John H. Masten and John J. Schrack a certain mining lease upon certain real estate, particularly described, in Clay county, Indiana, with the exceptions therein mentioned,

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for the period of twenty-five years thence next following, for the purpose of mining coal therefrom, amongst other purposes; in which said lease the said Masten, Masten and Schrack undertook, covenanted and agreed with the appellee to mine coal enough from under said land, that the rent or royalty thereon should amount to \$1,200 per year, at twenty-five cents per ton, and that, in the event that they should fail to mine that quantity of coal, they agreed, undertook and covenanted with the appellee to pay him said amount of money per year, in monthly instalments of \$100 each month, a copy of which lease was filed with and made a part of said complaint; that on the 20th day of September, 1873, the said Masten, Masten and Schrack sold and transferred said lease by assignment to the appellant, a copy of which assignment was filed with and made a part of the complaint; that, upon said assignment, the appellant agreed and undertook to perform each and every of the covenants and agreements contained in said lease, and, in pursuance of said lease and assignment, immediately took possession of said land and the coal strata thereunder, and commenced to dig and mine and remove the coal from under said land, and had ever since, from that date to the time of the commencement of this suit, been in possession of said land and coal strata, and in the peaceable enjoyment thereof, digging and mining said coal.

But the appellee averred that the appellant had failed, neglected and refused to keep and perform the agreements and covenants contained in said lease in this, that, from the 15th day of September, 1876, the appellant had wholly failed and neglected to mine coal enough that the rent or royalty thereon would amount to \$100 per month, or \$1,200 per year, and had wholly failed and neglected to pay said \$100 per month or any part thereof; that the whole of said monthly payments of \$100 each from the 15th day of September, 1876, to the 15th day of November, 1877, amount-

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ing to the sum of \$1,400, with the interest thereon, was due and unpaid. Wherefore, etc.

In discussing the sufficiency, or, as they claim, the insufficiency, of the complaint, the appellant's learned counsel earnestly insist that the material allegations of the complaint, in regard to the rent or royalty sued for, are not authorized nor sustained by the written lease upon which the action is founded. A copy of the lease was filed with and made a part of the appellee's complaint; and if there is any material variance between the copy of the lease, and the allegations of the complaint founded on any part or portion of the lease, the copy will control and will be presumed to be right until the contrary is shown. This rule is settled by the decisions of this court. *Stafford v. Davidson*, 47 Ind. 319; *Crandall v. The First National Bank of Auburn*, 61 Ind. 349; *Carper v. Gaar, Scott & Co.*, 70 Ind. 212.

In the proper presentation of the point made and discussed by the appellant's counsel, it is necessary that we should set out the covenants and agreements of the lessees, which constitute the basis of the action, and this we will do in the language of the lease, as follows:

“In consideration of which several grants by the party of the first part, the party of the second part agree to enter upon said land and test the same for coal within ninety days from the date of this lease, and should they find coal upon said land, of sufficient quantity, quality and thickness to justify them in mining the same, then they agree to sink a shaft, slope or drift upon the same, and be mining coal within one year from this date, or, in default thereof, to pay the party of the first part the sum of one hundred dollars per month until such shaft or tunnel or drift shall be put into operation; that they will mine enough from under said land, that the royalty thereon, at twenty-five cents per ton, 2,040 lbs., shall amount to the sum of twelve hundred dollars, and, in default thereof, they shall pay to said first party

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the said sum of twelve hundred dollars, without having so mined, payable in monthly instalments of one hundred dollars per month. And the party of the second part further agree that they will pay to the party of the first part the sum of twenty-five cents per ton of 2,040 lbs. of screened coal, mined from under said land, the screen to be used in screening the same to be of no greater width between the bars than one and one-quarter of an inch. * * * All coal mined from under said land shall be paid for on the 15th day of each month thereafter, in bankable funds of the State of Indiana. * * * It is further understood and agreed that all payments herein provided for, of one hundred dollars per month, to be paid on the 15th day of each month, are to apply on the payments of rent or royalty of coal mined from the above described land: *Provided, however*, that, if the 15th day comes on Sunday, payments may be made, either on the day before or the day after said date; in default of payment on said date, this lease shall not be forfeited until demand shall have been made," etc.

These are all the provisions of the lease which relate to the rent or royalty reserved, and constitute the basis of the appellee's action. As we understand the final argument of the appellant's counsel, in this cause, they claim a construction of these provisions, and ask this court to approve and adopt it, which, as we think, was not intended at the time of the execution of the lease by the original parties thereto, and is not warranted by the language used therein, as above quoted. It is claimed by counsel, as we understand them, that the "one hundred dollars per month," and the "twelve hundred dollars," mentioned in the lease, were applicable only to the "one year" from the date of the lease, within which the lessees, if coal were found sufficient to justify them in mining, should be mining such coal, and were in the nature of a penalty for their default, if any, in this regard, within that year; and that "for all coal mined thereafter, during

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the existence of the lease," the lessees were to pay, as rent or royalty, "at the rate of twenty-five cents per ton of 2,040 pounds, and no more, on the 15th day of each month." This construction of the covenants and agreements of the lessees, in regard to the rent or royalty reserved in the lease, does not meet the approval of our judgment, and we can not adopt it.

We are of the opinion that the lessees' covenants and agreements, above quoted, if, upon their test of the lessor's land, they found coal therein or thereon, "of sufficient quantity, quality and thickness to justify them in mining the same," bound them, *first*, to "sink a shaft, slope or drift upon the land, and be mining coal within one year" from the date of the lease, and if they made default in the performance of this first covenant, that is, if they did not sink a shaft, etc., and be mining coal within one year, etc., they agreed to pay the lessor, in the nature of a penalty, the sum of \$100 per month "until such shaft or tunnel or drift shall be put into operation." This first covenant is certainly not the covenant or agreement upon which the appellee sued in this action, and it seems to us to be entirely independent of the next succeeding covenant or agreement, which fixes the minimum rent and prescribes the amount of royalty reserved under said lease. Fairly construed, the provisions of the lease above quoted bound the lessees, in our opinion, to the payment of the fixed minimum rent of one hundred dollars per month, in any event, after they had sunk a shaft, etc., and were mining coal, and to the payment of a royalty of "twenty-five cents per ton of 2,040 pounds," with the agreement, however, that if the royalty upon the coal mined in any one year, at the rate aforesaid, should amount in the aggregate to more than the sum of \$1,200, the minimum rent of \$100 per month should be applied in payment of such aggregate sum, and the lessees should only be required

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to pay the excess of the royalty, as such, over and above the said sum of twelve hundred dollars.

Under this construction of the lessees' covenants and agreements, in the lease in suit, which seems to us to be the fair and reasonable construction thereof, it is very clear that the appellee's complaint in this case stated facts sufficient to constitute a cause of action against the appellant as the assignee of the lessees in such lease. It appeared from the allegations of the complaint, that, in less than one month after the date of the lease, the lessees therein sold and transferred such lease to the appellant, by their written assignment thereof; that, in pursuance of said lease and assignment, the appellant had immediately taken possession of the land demised, and of the coal strata thereunder, and commenced to dig, mine and remove the coal from under said land, and had ever since, from that date to the day of the commencement of this suit, December 6th, 1877, been in the possession of said land and coal strata, and in the peaceable enjoyment thereof, digging and mining said coal. Under these allegations of the complaint, it is certain, we think, that the appellant, as the assignee of the lessees in the lease in suit, is liable to the appellee, the lessor, for the minimum rent of one hundred dollars per month for the fourteen months mentioned in the complaint, and during which the appellant, as alleged, was in the peaceable enjoyment and possession of the demised premises, under the lease, digging and mining coal. For, although there was no privity of contract between the appellee, the lessor, and the appellant, as the assignee of the lessees, yet there was a privity of estate between them, as long as the appellant remained in possession of the demised premises, which created a debt for the rent or royalty reserved in the lease, in favor of the appellee and against the appellant. *Howland v. Coffin*, 9 Pick. 52; *Gordon v. George*, 12 Ind. 408; *Carley v. Lewis*, 24 Ind. 23; *McDowell v. Hendrix*, 67 Ind. 513.

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Our conclusion is, that the court committed no error in the case at bar, in overruling the appellant's demurrer to appellee's complaint.

The evidence introduced by the parties, on the trial of this cause, was not made a part of the record now before us. Under the alleged error of the trial court, in overruling the appellant's motion for a new trial, only a single supposed erroneous decision has been so saved in the record as to present any question for the decision of this court. It appears, from a bill of exceptions set out in the record, that the appellant, at the proper time, introduced one Thomas Watson, a competent witness, who testified, among other things, that the mineable coal under the demised lands of the appellee had been exhausted and mined out before the advanced royalty, mentioned in the complaint, had accrued, and that the appellant had fully paid the appellee, before the commencement of this suit, the stipulated royalty mentioned in said lease, on all coal dug and mined under said land; and that the appellant further offered to prove by said witness the entire quantity of coal mined and paid for, under appellee's land, up to the commencement of the suit, and also offered, at the proper time, to prove the same facts by Albert Watts, another competent witness. The bill of exceptions shows that the appellee objected to the introduction of the offered testimony, upon the ground that it was irrelevant and immaterial, which objection the court sustained, unless the appellant would further prove that it had, in any year, mined coal, the royalty on which would exceed the stipulated annuity of \$1,200, and that "the court refused to permit either of said witnesses to testify to said facts."

The record of this cause fails to disclose the object or purpose for which the excluded evidence was offered by the appellant. It was not relevant, certainly, to the issues in the cause; for these had reference only to the minimum rent of \$100 per month. The appellee sued for the recovery of

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the monthly rent, reserved in the lease, of \$100 for each month, which was to be paid in any event, and without regard to the quantity of coal mined; and he asserted no claim for royalty in excess of the minimum monthly rent. Upon the issues joined in the cause, it seems to us that the facts, which the appellant offered to prove, were wholly irrelevant and immaterial; and, in the absence of the evidence from the record, we can not say that those facts became relevant or material, by reason of any matter occurring at the trial. The record fails to show, we think, that the court committed any error in overruling the appellant's motion for a new trial; and therefore, as all the presumptions are in favor of the correctness of the court's ruling, we are bound to say that the trial court did not err in such ruling or decision. *Myers v. Murphy*, 60 Ind. 282; *Stott v. Smith*, 70 Ind. 298; *Bowen v. Pollard*, 71 Ind. 177.

We find no error in the record of this cause, which will authorize or justify the reversal of the judgment below.

The judgment is affirmed, at the appellant's costs.

No. 7153.

SHARTS *v.* AWALT ET AL.

PROMISSORY NOTE.—Assignment.—Notice.—The owner by assignment of a promissory note, not governed by the law merchant, holds the same subject to all legal rights of third persons, acquired against the maker on account of indebtedness, before notice of the assignment.

SAME.—Judicial Sale.—The owner by assignment of a promissory note, not governed by the law merchant, can not disturb the legal rights of a third person, acquired through a proper judicial proceeding against the maker of the note, before notice of the assignment.

FORECLOSURE.—Attachment.—A mortgage may be foreclosed in an attachment proceeding, and a party purchasing the mortgaged land, under such proceeding, holds it discharged of the mortgage.

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SAME.—Evidence.—Record.—In an action to foreclose a mortgage, A., who was made a party defendant, answered, setting up a purchase of the mortgaged land, under certain attachment proceedings against the assignee, in which the maker was garnished; and, on the trial, the record of said attachment and garnishment proceedings was offered in evidence.

Held, that the evidence was competent.

From the Ripley Circuit Court.

E. P. Ferris, W. W. Spencer and W. W. H. McCurdy,
for appellant.

WORDEN, J.—On November 4th, 1875, William G. Parker executed to Uriah D. Sharts his five several promissory notes, not governed by the law merchant, each for the sum of two hundred dollars, payable respectively in one, two, three, four and five years. At the same time he executed a mortgage on an eighty-acre tract of land, in Ripley county, to secure the payment of the notes.

This action was brought by John H. Sharts, as the assignee of the notes, to foreclose the mortgage, and William Lewis and his wife, John Awalt and Oliver Wells, administrator of the estate of William G. Parker, were made defendants. All of the defendants made default except Awalt, who answered, setting up a purchase of the land mortgaged, under certain attachment proceedings against Uriah D. Sharts, in which Parker was garnished.

Some questions are made on the pleadings, but as the same questions, in substance, arise on the special finding of the facts, which presents the legal merits of the case, we deem it unnecessary to consider further the pleadings.

The cause was submitted to the court for trial, and, at the request of the plaintiff, the court found the following facts, and stated the conclusions of law thereon:

“1st. On the 4th day of November, 1875, one William G. Parker made and executed to one Uriah D. Sharts, by the name and style of W. G. Parker, his five several promissory notes, each calling for \$200; said notes payable

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in one, two, three, four and five years from date, and, to secure said notes, at the same time executed a mortgage upon the following real estate in Ripley county, Indiana, to wit: The west half of the north-west quarter of section 34, town 9 north, of range 12 east, the said notes and mortgage being the same sued upon in this action; that afterward the said Uriah D. Sharts assigned said first note, by endorsement, to one William Selking, who, in February, 1877, assigned the same, by delivery, to the said John H. Sharts, the plaintiff herein; that, about the 1st of December, 1875, the said Uriah D. Sharts assigned the other four of said notes to the said plaintiff, by endorsement.

“2d. That, on the 10th day of February, 1876, John Awalt, one of the defendants herein, commenced his action, in this court, against the said Uriah D. Sharts, William G. Parker, and, auxiliary thereto, a proceeding in foreign attachment against the said Uriah D. Sharts, and a proceeding in garnishment against the said Parker; that due and legal notice was given to the said Uriah D. Sharts, by publication, of the commencement and pendency of said action and proceeding in attachment; that due and legal notice, by summons personally served, to appear and answer as such garnishee, was given to said Parker; that said summons was served by reading, on the 23d day of March, 1876; that said Parker appeared in obedience to said summons, and filed his answer, admitting his indebtedness to the said Uriah D. Sharts upon said notes, which answer was filed on the 19th day of May, 1876, at the April term of said court; that there was nothing averred in said answer about the assignment of said notes and mortgage, or either of them, to the plaintiff herein, or to any one else; that, on the said day and at the same term of said court, the said Uriah D. Sharts was defaulted; that, on the 6th day of September, 1876, at the September term of this court, a judgment was rendered in said action for the sum of \$240.70, and costs of suit,

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against said Parker as garnishee, on account of and upon said notes, and an order for the sale of said mortgaged premises, in default of payment, as said notes should mature and not be paid; that, on the 6th day of November, 1876, execution and order of sale issued upon said judgment, to the sheriff of said county of Ripley, who, on the 9th day of December, 1876, after having levied said execution and order of sale upon said real estate, and having duly advertised the same, and taken such other steps as are required by law, sold the same to the said John Awalt for the sum of \$316.70, who then and there paid the amount of his bid, and said sheriff then and there executed to him a certificate of purchase.

“3d. The court further finds, that when said suit and attachment proceeding was instituted, and notice given, and the said summons served upon said Parker, the said Uriah D. Sharts was a non-resident of the State of Indiana.

“4th. It is further found that the said Awalt and the said Parker had no notice of the assignment of said notes, or any of them, by the said Uriah D. Sharts, until after the sale to the said Awalt, by said sheriff.

“5th. It is further found, that the said John H. Sharts paid \$185 to the said Selking, for the said note purchased of him, and about \$325 for the other four of said notes, purchased of the said Uriah D. Sharts; that the said Uriah D. Sharts sold said notes to enable him to pay a part of his indebtedness, and to get money with which to go to Iowa, and not to defraud creditors.

“The conclusions of law from the facts so found are:

“1st. The plaintiff, having purchased the notes for value and in good faith, is the absolute owner and holder thereof.

“2d. That the owner by assignment of promissory notes, not payable in bank, holds the same subject to all legal rights of third persons, acquired against the maker on account of the indebtedness, before notice to the maker of the assignment.

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“3d. That the owner by assignment of promissory notes, not payable in bank, can not disturb the legal rights of a third person, acquired through a judicial proceeding against the maker of the notes, before notice to the maker and such third person of the assignment, the court, in which such proceedings are had, having jurisdiction of the subject-matter and of the parties.

“4th. In an action and proceedings in foreign attachment, this court has jurisdiction of the subject-matter of the action, when there is a proceeding in garnishment, and the party garnished is indebted to the principal defendant, and the indebtedness is secured by mortgage upon real estate situate in this county, and has jurisdiction of the parties, where the principal defendant is a non-resident of the State and the garnishee is a resident of the State, but of another county, where due and legal notice has been given to the principal defendant by publication, and summons has been personally served upon the garnishee, who appears and answers, admitting the indebtedness.

“The finding, therefore, must be for the defendants.”

Judgment was therefore rendered for the defendant, the plaintiff having excepted to the conclusions of law. The plaintiff moved for a new trial, and for a *venire de novo*, but these motions were respectively overruled.

We are of opinion that the conclusions of law on the facts found were substantially correct.

Parker had given his notes, not governed by the law merchant, to Uriah D. Sharts, and a mortgage to secure their payment. The statute in relation to such notes provides that “Whatever defence or set-off the maker of any such instrument had, before a notice of assignment, against an assignor, or against the original payee, he shall have also against their assignees.” 1 R. S. 1876, p. 636, sec. 3. Therefore, in the absence of any notice of assignment of the notes, the debt might be the subject of garnishment at

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the suit of Awalt against Uriah D. Sharts, the payee. A standard writer says, that "Wherever notice of an assignment is required to be given by the assignee to the maker, there can be no good reason why the latter should not be held as garnishee of the payee, at any time before he receives such notice; but, on the contrary, unquestionable reasons why he should." Drake Attachments, 4th ed., sec. 575. The point is well settled by the decisions of this court. *Covert v. Nelson*, 8 Blackf. 265; *Shetler v. Thomas*, 16 Ind. 223. See, also, *Rooker v. Daniels*, 5 Ind. 519, and *The Junction R. R. Co. v. Cleneay*, 13 Ind. 161. The statute on the subject is broad enough to justify a foreclosure of the mortgage against Parker, in the attachment proceedings, as in other cases. Code, sec. 178.

The mortgage having been foreclosed in the attachment proceedings, and the land having been purchased by Awalt under those proceedings, he holds it discharged of the mortgage. He is not liable for the debt of the plaintiff, nor is the land in his hands liable therefor.

In respect to the motion for a new trial, it is urged that the court erred in admitting in evidence the record of the proceedings in attachment, inasmuch as the appellant was not a party to those proceedings. It was not necessary that the appellant should have been a party, in order to render the evidence competent. He was not known to be a necessary or proper party. He was guilty of laches in not giving Parker notice that he held the notes, whereby the mortgage was properly foreclosed, on the assumption that the original payee still held them.

It is also earnestly insisted, that the finding of the court as to the non-residence of Uriah D. Sharts, at the time of the institution of the attachment proceedings, was not sustained by the evidence. Without stopping to consider whether that question could be inquired into in this collateral action, we remark that we have examined the evidence, and, while

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it was conflicting, it is clear that there was evidence in support of the finding upon that point.

There was no valid ground for either the motion for a new trial or that for a *venire de novo*; and what we have said covers the substantial merits of the case.

The judgment below is affirmed, with costs.

No. 5591.

TRUEBLOOD, ADM'R, v. KNOX.

REPLEVIN.—Action on Bond.—It is no defence to an action on a replevin bond, that the amount thereof was less than double the value of the property replevied, although such defect may have been cause for a dismissal of the action of replevin before trial.

SAME.—Estoppel. — Penalty.—In a suit upon a replevin bond, the defendant is estopped from setting up the insufficiency of the penalty of such bond as a defence, after the writ of replevin had been issued and possession of the property obtained upon it.

From the Vigo Circuit Court.

R. Dunnigan and S. C. Stimson, for appellant.

NIBLACK, J.—Lord N. Trueblood, as the administrator of the estate of Leonard Trueblood, deceased, commenced this action, before a justice of the peace, against Thomas E. Knox and Elias O. George, upon a replevin bond.

There was no appearance to the action by George, and it is not shown that he was served with process. Upon an appeal to the circuit court the cause was tried by the court, the result being a finding and judgment for the defendant, Knox.

Error is assigned upon the overruling of the appellant's motion for a new trial, based upon the alleged insufficiency

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of the evidence to sustain the finding of the court. The evidence, as to some points in the case, was not very full and satisfactory, but it was made substantially to appear that, in February, 1875, one Lavina Trueblood brought an action of replevin against the appellant, before a justice of the peace, to recover the possession of a two-horse wagon and a double set of harness, which were claimed and held by the appellant, as the administrator of the estate of the said Leonard Trueblood, deceased; that, in order to obtain the issuance of a writ for the possession of the property, Knox and George executed the bond sued on in this action, on behalf of the said Lavina; that, upon a trial before the justice, the said Lavina recovered a judgment for the possession of the property sued for by her; that, soon afterward, Knox, as the agent of the said Lavina, sold the wagon and harness in controversy to one Armstrong, for the sum of fifty dollars, and that the wagon and harness were taken to the State of Illinois; that, after the property had been thus sold to Armstrong, the appellant in this action appealed the replevin suit to the circuit court, where afterward, on the motion of the said Lavina, it was dismissed without a trial in that court.

We have no brief from the appellee, and hence no argument in support of the proceedings below, but the appellant informs us that the bond in suit was held to be void, because the penalty named in it was less than double the value of the property the return of which it was given to secure. Upon the authority of the case of *Deardorff v. Ulmer*, 34 Ind. 353, that was an objection to the bond which the defendant in the replevin suit might have urged as a cause for the dismissal of the action before going to trial, but it by no means follows that such an objection could be set up as a defence in a suit upon the bond. On the contrary, upon every principle of fair dealing and of reciprocal obligation, the appellee was precluded from setting up the insufficiency of the penalty of the bond as a defence, after

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the writ of replevin had been issued, and the possession of the property obtained upon it. *Caffrey v. Dudgeon*, 38 Ind. 512.

We are of the opinion that, upon the evidence adduced, the finding of the court ought to have been for the appellant. *Wiseman v. Lynn*, 39 Ind. 250 ; *Tyler v. Bowlus*, 54 Ind. 333.

The judgment is reversed, with costs, and the cause remanded for a new trial.

No. 7577.

KING v. SUMMITT ET AL.

GUARANTY.—A verbal guaranty that a note is genuine and its maker liable to pay it, made by the assignor to the assignee at the time of its assignment and delivery, based upon a sufficient consideration, is a binding and valid obligation.

SAME.—*Statute of Frauds.*—A guaranty, that a third person is liable upon a note executed by him, is not a promise to answer for the debt of another, but an assurance of the existence of certain things.

SAME.—If a guaranty contains a promise to pay the debt of A., the averment that A. was a minor when he contracted said debt will take the case out of the statute of frauds.

From the Monroe Circuit Court.

E. K. Miller, for appellant.

J. W. Buskirk and *H. C. Duncan*, for appellees.

BEST, C.—This suit was brought by the appellant against the appellees. His complaint consisted of two paragraphs. In the first he alleged that one James Hayden, on the 16th day of July, 1875, made his note to the appellees for \$125, and that they endorsed it to him ; that at the time said Hayden made said note he was a minor, and was not liable to pay it ; that the appellant, in ignorance of that fact, brought suit upon said note against said Hayden, and by reason thereof said suit was unavailing.

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In the amended second he alleged that on the 16th day of July, 1875, one James Hayden made his note to the appellees for \$125, and they, in consideration of one hundred dollars to them paid by the appellant, sold and delivered to him said note, and “warranted and guaranteed to him that said note was valid and genuine, and that said James Hayden, the maker thereof, was legally liable to pay it;” that, at the time said note was made, said James Hayden was less than twenty-one years of age, and was in no wise liable to pay it; that the appellant, in ignorance of such fact, brought suit upon said note against said Hayden, before a justice of the peace, in the township where he resided, and by reason of such fact such suit was unavailing.

The appellee Christian A. Summitt filed a general plea of *non est factum* to the first, and a demurrer for want of sufficient facts to the second, paragraph of the complaint.

The court sustained the demurrer, and the appellant excepted. The appellant thereupon filed a demurrer to the answer of Summitt, which was overruled. No answer was filed by Gillespie, nor any step taken against him. The cause was submitted to the court for trial, and a general finding was made for appellees. The appellant moved for a new trial, because the decision was contrary to the law, and was not sustained by sufficient evidence. This motion was overruled, and appellant excepted. Final judgment was rendered for the appellees.

In this court the appellant has assigned the following as error:

1st. The court erred in overruling appellant’s demurrer to the answer of appellees to the first paragraph of appellant’s complaint;

2d. The court erred in sustaining appellees’ demurrer to the second amended paragraph of appellant’s complaint;

3d. The court erred in overruling appellant’s motion for a new trial.

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The failure of the appellant to reserve an exception to the action of the court in overruling his demurrer to the answer of appellees is a sufficient answer to the first assignment of error.

The second assignment presents the question whether or not a verbal guaranty that a note is a genuine and valid one, and its maker liable to pay it, made by the assignor to the assignee at the time of its assignment and delivery, based upon a sufficient consideration, is a valid and binding obligation? The appellees insist that it is not, for the reason that it is in contravention of the 1st section of the statute of frauds. 1 R. S. 1876, p. 503. That statute provides "That no action shall be brought * * * To charge any person, upon any special promise, to answer for the debt, default, or miscarriage of another."

It will be observed that this guaranty is not in terms a special promise to answer for the debt, default or miscarriage of another, nor can it be construed, as we believe, to embrace such an undertaking. It does not purport to be a promise to pay the debt for which the note was given, nor a promise that Hayden himself should pay it, but is simply a guaranty that the note is genuine, and that Hayden is bound by it; in other words, that Hayden had capacity to make it. It differs entirely from a promise to pay the debt. In such case, if the promise is valid, nothing short of payment amounts to a compliance; whereas, in this case, if the note is genuine, and Hayden had capacity to make it, the obligation is fulfilled without any payment at all; indeed, it is not broken.

The promise to answer for the debt of another is an undertaking to do something in the future; whereas a guaranty that a third person is liable upon a note signed by him is no promise at all, but is rather an assurance that a certain condition of things exists. A breach of such undertaking does not depend upon the failure of the guarantor to do

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something in the future, but, if the condition does not exist, ~~the undertaking is broken as soon as made~~, and a cause of action at once accrues, whether the note has or has not matured.

Again, there must be a debt as well as a promise; and, if in this case there was no debt, the undertaking is not within the statute. It is averred that Hayden was a minor when he executed the note, and that he was not liable upon it. The demurrer admits this. If so, was there any debt?

It is said in Browne on Statute of Frauds, sec. 156, that "the liability of the party for whom a guarantor within the statute makes himself answerable, must be a clear and ascertained legal liability, capable of being enforced against the party himself." Thus, if the party be a minor or a married woman, or under any other legal disability as to forming binding contracts, it is manifest that a promise, by a third person, to answer for him or her, in a matter within the range of that disability, can not be affected by the statute of frauds.

If the guaranty in this case contained a promise to pay the debt of Hayden, the averment that he was a minor when he executed the note took the case out of the statute. No other objection is urged, and we discover none. We think the court erred in sustaining the appellees' demurrer to this paragraph of the complaint.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and is hereby, in all things, reversed, at costs of appellees, with instructions to overrule the demurrer to the second paragraph of the complaint.

No. 7344.

LEE ET AL. v. TEMPLETON, GUARDIAN.

WILL.—Contesting Validity of.—Jurisdiction.—Presumption.—Pleading.—Complaint.—While it is necessary, in order to give the court jurisdic-

73	315
145	668

73	315
158	522

73	315
158	675

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tion of an action to contest the validity of a will, that the testator must have died in, or left assets in, or assets of the estate must have come into, the county where such contest is made, yet, where the court is one of general jurisdiction, like the circuit court, the facts which give it jurisdiction of the subject of the action need not affirmatively appear on the face of the complaint, and its jurisdiction will be presumed unless the contrary appears.

SAME.—Legatee.—Where one receives a legacy under a will, he can not contest the validity of the will without restoring the legacy, or bringing the money into court.

SAME.—Estoppel.—Partition.—Where a devisee under a will joins in a suit for partition of lands devised by such will, claiming an interest therein as devisee, and is defeated in such suit, he is not thereby estopped to afterward contest the validity of such will on account of the mental unsoundness of the testator. if, at the time of the proceedings in partition, he had no notice of the mental unsoundness of the testator at the time of the execution of the will.

From the Hamilton Circuit Court.

J. W. Evans, R. R. Stephenson, T. J. Kane and T. P. Davis, for appellants.

D. Moss, D. V. Burns and C. S. Denny, for appellee.

WORDEN, J.—This was an action by Samuel Templeton, as the guardian of William S. and Rosa M. Templeton, minors, and grandchildren of John Lee, deceased, against the appellants, to contest and set aside the supposed last will and testament of the said John Lee, on the ground of the mental unsoundness of the testator.

By the will in question, the testator made the following disposition of his property, viz. :

“I give and bequeath to my wife, Elizabeth Jane Lee, all the household goods of which I may be in possession at the time of my death, to be held and used by her during her lifetime, and, at her death, to be sold and divided equally amongst my children. The balance of the personal property to be sold and divided so as to make all the children equal, including whatever amount any of them have heretofore received.

“I give to my said wife, during her lifetime, the use of

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the dwelling-house, orchard and garden ; also the annual sum of four hundred dollars, for her own use and boarding the two minor children, Cynthia Lee and Francis M. Lee, until they shall become of age, to be paid out of the proceeds of the farm.

“Also, to Cynthia Lee and Francis M. Lee, the annual sum of seventy-five dollars each, for the purpose of clothing and schooling until they shall become of age, to be paid out of the proceeds of the farm. The real estate to be divided equally between all the children, after the payment of the legacies aforesaid.

“I further give and bequeath to my said wife one cow, and the use of sufficient pasture to keep her.”

The defendants answered as follows :

“All the defendants in the above cause, for answer to the complaint, say :

“1st. That they deny each allegation contained therein.

“2d. For a second and further answer to the complaint said defendants say, that at the May term, 1877, of this court, the plaintiff and all the defendants to this suit, except Joseph Lee and Madison Lee, filed a petition for partition against said Joseph and Madison Lee, which petition is in the words and figures following, to wit :

“ ‘State of Indiana, Hamilton county, ss. :

“ ‘*Elizabeth J. Lee, Melissa Abgar, Peter Abgar, Sarah A. Foland, Matilda J. Lee, Lewis M. Foland, Cynthia Lee (by Jacob Zeller, her guardian), Francis M. Lee (by Elizabeth Lee, his guardian), William S. Templeton and Rosa May Templeton (by Samuel Templeton, their guardian in fact), petitioners, v. Joseph Lee and Madison Lee, defendants. Petition for partition.*

“ ‘In the Hamilton Circuit Court.

“ ‘*To the Hon. Hervey Craven, sole Judge of said Court:*

“ ‘Your petitioners would represent and show to your Honor that, on the — day of —, one John Lee departed this life

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testate, the owner in fee-simple of the following described real estate, to wit:’ ’ Describing the real estate.

“ ‘That said John Lee left surviving him, as his only heirs and devisees, said Elizabeth J. Lee, his widow, said petitioners, Melissa Abgar, intermarried with Peter Abgar, Sarah A. Foland, intermarried with Andrew J. Foland, Matilda J. Foland, intermarried with Lewis M. Foland, Cynthia Lee and Francis M. Lee, and said defendants, Joseph Lee and Madison Lee, his children, and said petitioners, William S. Templeton and Rosa May Templeton, his grandchildren, the children of Hannah Templeton, his daughter, deceased; that, by the terms of his last will, a copy of which is filed herewith as part hereof, said John Lee devised to his said widow, Elizabeth J. Lee, the use, possession and occupancy of the dwelling-house and orchard on said real estate, and the use of sufficient pasture thereon to keep one cow, and also the annual sum of four hundred dollars, all for and during her natural life; that, by the terms of said will, he also devised to each of the said petitioners, Cynthia Lee and Francis M. Lee, the annual sum of seventy-five dollars until they shall arrive at their full age, said legacies aforesaid to be paid out of said real estate aforesaid; that he also, by the terms of his said will, devised to each of his said children, namely, Melissa Abgar, Sarah A. Foland, Matilda J. Foland, Cynthia Lee, Francis M. Lee, Joseph Lee and Madison Lee, and to said William S. Templeton and Rosa May Templeton jointly, the undivided one-eighth part in value of said real estate aforesaid, subject to the legacies mentioned in said will; that the said Hannah Templeton, the mother of said William S. Templeton and Rosa May Templeton, and the daughter of said testator, departed this life on the 30th day of November, 1872, leaving the said William S., four, and the said Rosa May, two years of age, her only children.

“ ‘Immediately after her death, the said testator, then be-

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ing in full life, took her said children to his own house and made them members of his family, where they continued to reside up to the time of the making of said will and his death. And from the time said testator took said orphans into his family as aforesaid, up to said time of his death, he called them "children," and in every way recognized them as his children, occupying the place and entitled to all the rights of their deceased mother. And the petitioners aver that said testator, at the time of the execution of said will, understood and believed that the term "children," as used by him in said will, embraced the said William S. and Rosa May, as well as the surviving children of his body. And the petitioners further aver that the said testator, during this [his] lifetime, and at the time he caused said will to be drafted, and when he executed the same, had no intention of disinheriting the said William S. and Rosa May. On the contrary, by the use of the term "children," wherever it occurs in said will, he, said testator, intended to and did include and embrace them, said orphans, as legatees, and he intended thereby to devise to them an equal share with each of his surviving children.

"And the petitioners further aver, that the omission by said testator to use some term more definite than the general term "children" in said will, for the purpose of designating the said William S. and Rosa May as legatees as aforesaid, occurred solely in consequence of said understanding and belief of said testator, existing at the time of the execution of said will as aforesaid, that said term "children," as used in said will, embraced them as well as his said surviving children, and not otherwise; that said defendant Joseph Lee holds his said interest in said real estate subject to an advancement of \$1,000, and that said defendant Madison Lee holds his said interest in said real estate subject to an advancement of \$180, made to them and each of them respectively as aforesaid by their said father, John Lee, during his lifetime; that, by virtue of the premises aforesaid,

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said petitioners and defendants herein are now the owners in fee simple of said real estate aforesaid, as tenants in common in the proportion hereinbefore named. Your petitioners being desirous of having and holding their said respective interests in said real estate aforesaid in severalty, ask the court that partition thereof be made in pursuance of the statute in such cases made and provided ; that if partition thereof can not be made without damage to the owners thereof, that the same be sold and the proceeds thereof divided among the parties entitled thereto ; that said legacies and annuities in favor of said petitioners, Elizabeth J. Lee, Cynthia A. Lee and Francis M. Lee, herein referred to, be declared a lien on said real estate aforesaid in favor of the parties entitled thereto respectively, and that partition thereof be made subject thereto as aforesaid, the court and commissioners appointed to make such partition take into consideration the advancements made to said defendants and each of them as aforesaid, and that said mistake aforesaid be corrected.

“ ‘And the petitioners ask for all other proper relief.

“ ‘D. Moss and Kane & Davis, attorneys.

“ ‘Filed February 8th, 1877. J. R. GRAY.’

“ ‘That said will was at the time duly probated.

“ ‘Thereupon the defendants Joseph and Madison (Lee) answered said complaint, admitting all the allegations therein except so much of said complaint as set up a cause of action in the plaintiffs, William S. and Rosa May Templeton, which they denied, and upon the issues thus formed said cause was submitted to a jury for trial, and from the special findings of the jury in said cause the court adjudged and decreed that the plaintiffs, William S. and Rosa May Templeton, had no right, title or interest in and to said real estate, but that the same was, by the terms of said will of said John Lee, deceased, divided [devised] to said testators, said surviving children, subject to the legacies and bequests therein contained ; and the court thereupon awarded a decree of

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partition of said land, and appointed commissioners to divide the same.

“That said commissioners thereupon divided said land, setting off to each of said surviving children of said testator one-seventh part in value, subject to said legacies mentioned in said will, and reserving to the widow her right to the dwelling-house, orchard and garden during her life, and made report thereof to this court at said May term, which report was in all things approved, and said commissioners were discharged, and final judgment of partition rendered therein by said court. And the defendants aver, that from said decree of this court, awarding partition of said lands and the report of said commissioners, and the approval thereof by the court, no appeal has been taken, but that the same is now in full force and effect.

“And these defendants now aver and show to the court that the plaintiffs, by their said complaint, by the issues therein made, the trial of said issues in this court and the final judgment therein rendered, thereby claimed under said will and thereby accepted, ratified and confirmed and admitted of record the validity of said will, and the competency of said testator to make the same; that these defendants placed full faith and reliance upon the validity of said will so admitted of record as aforesaid, and pursued [prosecuted] the issue so made to final judgment as aforesaid, and in doing so incurred large expenses for the costs of said suit, and for attorneys’ fees in conducting the same, to wit, the sum of five hundred dollars, and, in pursuance of the said final judgment of partition awarded by the court, took possession of their respective interests in said land so set off to them under said partition proceedings, and made valuable and lasting improvements thereon. And the defendant Elizabeth J. Lee, as the widow of said testator, elected to take under the provisions of said will, and has been receiving the legacies and bequests therein specified, from her co-

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defendants, ever since said real estate was so divided in said partition suit; and the defendants have each been paying the minor children of said testator the legacy of \$75.00 so bequeathed to them by said testator. Wherefore the defendants say that, by reason of the premises, the plaintiffs in this suit are precluded and estopped from ever attacking or questioning the validity of said last will and testament of said John Lee, deceased. And they demand judgment for costs, and all other proper relief."

A demurrer for want of sufficient facts, to the second paragraph of answer, was sustained, and exception taken. Such further proceedings were had as that it was adjudged that the testator, John Lee, at the time of the execution of the supposed will, was not of sound mind, and the will and probate thereof were revoked, vacated and set aside.

The errors assigned are:

1st. That the complaint does not state facts sufficient to constitute a cause of action; and,

2d. That the court erred in sustaining the demurrer to the second paragraph of answer.

The objection urged to the complaint is, that it does not show that the court below had jurisdiction over the subject of the action; in other words, that the testator, at the time of his death, was a resident of Hamilton county, or that there was any part of his estate in that county; and, to this point, the cases of *Sutherland v. Hankins*, 56 Ind. 343, and *Harris v. Harris*, 61 Ind. 117, are cited. The question involved has been more recently before this court, in the case of *Kinnaman v. Kinnaman*, 71 Ind. 417.

In that case it was said: "The first ground of the motion to dismiss was, as has been seen, that there was no proper complaint on file. The question has been discussed by counsel on both sides, whether the complaint was not radically defective in not showing that the court had jurisdiction over the subject of the action. In the case of *Thomas v.*

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Wood, 61 Ind. 132, 137, it was held, that, in order to give the court jurisdiction to contest the validity of a will, the testator must have died in, or left assets in, or that assets of the estate must have come into, the county where the contest is carried on. In that case, as in the present," (and as in the case now before us,) "the complaint was silent as to any of these jurisdictional facts. It showed nothing on the subject one way or the other ; but the evidence showed the jurisdiction, and this was held to be sufficient to uphold the proceedings.

"Doubtless, if a complaint should show affirmatively that the court had no jurisdiction of the subject of the action, it would not be error to dismiss the proceedings. But where the court is one of general jurisdiction, like the circuit court, the facts which give it jurisdiction of the subject of the action need not affirmatively appear on the face of the complaint. It" (the jurisdiction) "will be presumed, unless the contrary appear. The ruling in the case above cited must rest on this principle ; for, if it were essential that the facts giving the court jurisdiction should affirmatively appear on the face of the complaint, the evidence could not aid the defect.

"The proposition above stated is fully sustained by the following authorities." (Here authorities are cited, not necessary to be repeated.) "There was nothing in the first reason assigned for the dismissal of the proceedings." The objection to the complaint can not be maintained.

We come to the second paragraph of answer. It seems to us that the paragraph was bad, and that the demurrer to it was correctly sustained. The following is a statement of the ground on which it is claimed by the appellants that the demurrer should have been overruled: "The appellees, having attempted to procure partition of the lands of John Lee, deceased, claiming an interest therein as devisees under the will, and being defeated in that action, and the appellants having acquired vested rights, and having invested money on the strength of their respective titles acquired in

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said partition proceedings, are estopped to deny the validity of said will. The appellees, having elected to claim under the will, although minors, are confined to the remedy to which they first resorted. They can not blow both hot and cold. It is either the will of John Lee, or it is not. The appellees, having elected to say that it was his will, claiming rights under it as devisees, are precluded from controverting its validity.”

It may be conceded that a person, who has received a legacy under a will, can not contest the validity of the will, without restoring the legacy, or bringing the money into court. *Holt v. Rice*, 54 N. H. 398 ; S. C., 20 Am. Rep. 138.

The wards of the appellee, by their guardian, joined in the partition suit, seeking a portion of the land under the will, but in this they were defeated; they obtained nothing; hence, they have nothing to restore. If they are estopped to contest the will, it is simply because they elected to claim a part of the land under it, and joined in the partition suit. The doctrine of estoppel by election is thus stated by a writer on the subject:

“A party can not occupy inconsistent positions ; and where one has an election between several inconsistent courses of action, he will be confined to that which he first adopts. Any decisive act of the party, done with knowledge of his rights and of the fact, determines his election and works an estoppel.” Bigelow Estoppel, 503.

It is thus seen, according to this elementary authority, that, to work an estoppel by an election between inconsistent positions, the party sought to be estopped must have a knowledge of the facts. Another elementary writer on the subject, speaking of estoppels of this character, uses the following emphatic language; “But the estoppel is not created unless the acts or declarations constituting it are plainly inconsistent with the rights which they are alleged to have barred, and were made with full knowledge of its exist-

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ence.” Herman Estoppel, sec. 475. This is in accordance with the case of *Rodermund v. Clark*, 46 N. Y. 354, a case that seems to be relied upon by counsel for the appellants. There the court said: “Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts. The remedies are not concurrent, and the choice between them being once made, the right to follow the other is forever gone. (*Morris v. Rexford*, 18 N. Y. 552.) Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies.” An application of the doctrine thus laid down, to the case before us, shows that the paragraph in question was insufficient, for the reason, if for no other, that it does not show that either the plaintiff or his wards, at the time of the proceedings in the partition suit, had any notice of the mental unsoundness of the testator, at the time of the execution of the will, and its consequent invalidity. Without such notice it is clear, on the authorities, and on general principles in respect to estoppels *in pais*, that the proceedings in partition can not estop the appellee, on behalf of his wards, to contest the validity of the will. See *Fletcher v. Holmes*, 25 Ind. 458.

The judgment below is affirmed, with costs.

No. 7247.

HELMS ET AL. v. THE WAYNE AGRICULTURAL CO.

PROMISSORY NOTE.—Principal and Surety.—Forgery.—When the name of one of two or more obligors in a bond, note or other writing obligatory has been forged, the other co-obligor, though a surety only, and though he signed in the belief that the forged name was genuine, is neverthe-

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less bound, if the payee or obligee accepted the instrument without notice of the forgery.

SAME.—Principal and Agent.—Where a creditor sends a note either in blank or filled up, as to the amount thereof, to his debtor, with a request that he get security thereon, the debtor does not thereby become the agent of the creditor for the purpose of procuring such security.

PRACTICE.—Modified Instruction.—Record.—Bill of Exceptions.—Where the words modifying an instruction are excepted to, but the exception is neither signed nor authenticated by court or counsel, the modification is not properly made a part of the record, on appeal to the Supreme Court, without a bill of exceptions.

From the Madison Circuit Court.

R. R. Stephenson, for appellants.

W. Garver, for appellee.

WOODS, J.—Suit by the appellee, against the appellants and Isaac N. Poe, begun in Hamilton county and taken by change of venue to Madison county. The appellants denied the execution of the note, and filed other special pleas, the nature of which will become apparent as we proceed. Error is assigned only upon the overruling of the motion for a new trial, and the counsel for the appellants insists only upon errors claimed to “arise out of the instructions given and refused.”

The following are the instructions complained of:

“1st. This action is brought by the plaintiff on two joint promissory notes, claimed to have been issued jointly by all the defendants, to the plaintiff. The defendant Poe makes no defence. The defendant Helms claims that he never executed the notes in suit, that is, he never signed them himself, nor authorized any one to sign them for him, and that he never affirmed or ratified the signature after it was so placed to said notes, in any manner whatever. The other defendant, Cardwell, claims that his co-defendant Helms’ name or signature was feloniously placed to said notes, by some person not known to them, that is, the name of said Helms was forged to said notes, and that, as

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the notes were therefore void as to Helms, he, Cardwell, was also released by said forgery, and the plaintiff ought not to recover against him, as the name of Helms was on when he signed. The said defendants also filed a joint answer, setting up that the plaintiff procured both of said defendants to execute the notes through fraud; that the notes were presented in blank, and so signed, with the agreement that they be filled up for certain sums, when the plaintiff, after the signatures were obtained, filled the blanks with different and greater sums than were agreed upon, and put a false date to said notes, making them mature sooner than by the agreement they were to fall due. Now, if these or any one of the material facts in this joint answer be proven true by a preponderance of the evidence, you should find for the said defendants; otherwise you should find for the plaintiff, unless you further find that Helms' name to the notes was forged, and that he never executed said notes, then he is not bound, and you should find for him, and for the plaintiff as against the other defendants, if she has proven, by a preponderance of all the testimony, that the notes were executed by the other defendants, as alleged in her complaint.

“2d. The notes in suit, being joint notes executed by several parties, one of the names thereon being forged, they would be void as to the person whose name was forged, but valid as to the other makers, unless at the time she accepted said notes the plaintiff had knowledge of the forgery, or in some way participated in the fraud of wrongfully obtaining the said signature; but, if you find that the plaintiff received and accepted said notes in good faith and without any knowledge or information that any of the signatures were not genuine or false, being innocent of any wrong, the law protects her, and you should find for the plaintiff against those who did sign the notes.

“3d. Where several persons execute a joint note, and

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it is delivered to and received by the payee in good faith, the parties who signed are not discharged because the name of one is forged to such note, and it makes no difference whether the forged name stands first or last on such note, for the law implies an assertion on the part of each who signs, that all the names preceding his are genuine, for it is not to be presumed that a man would affix his name to a note when the prior names were forged; and, if one of two innocent persons have to lose by the wrong of a third, the law places the loss on the party who had the opportunity to avoid the wrong and did not do it, as every one ought to know when he signs a note with other signatures thereon, that all are genuine, and, failing to do so, is guilty of neglect, and must bear the consequences; and if you find from the evidence in this case, that such were the facts as to said defendant Cardwell, he is liable, and you should find against him on said issue.

“4th. Where sureties sign a note, with an agreement that other persons shall sign the same before it is delivered, and the note is delivered without being signed by such other persons, it will still be binding on such as sign it, unless the payee of the note is a party to the agreement. . Hence, if you should find that the notes in suit were signed by the defendants Helms and Cardwell, under an agreement with the principal that other persons should sign the said note before it should be delivered, and that it was delivered without such other signatures, to the principal in the notes, and the plaintiff knew nothing of such agreement, and was no party thereto, then it could not bind the plaintiff, and your verdict should be for the plaintiff.”

The appellants also excepted to the refusal of the court to give the following instructions :

“5th. If you believe from the evidence that Isaac S. Poe signed the defendant Helms' name to the notes sued on, without the consent of Helms, then you should find for both

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the defendants, unless the defendant Cardwell signed the notes knowing that Helms' name was forged.

"7th. And if these notes were signed by Poe in the name of Helms, without such proper authority from Helms, then you should find for both Helms and Cardwell, if Cardwell signed in the honest belief that the signature of Helms was genuine.

"8th. And if the notes in suit were sent by the plaintiff, either filled up or not filled up, as to the amount of the same, to the defendant Poe with a request by the plaintiff for Poe to get security on them, then, for the purpose of obtaining such security, the said Poe, was the agent of the plaintiff, and the plaintiff can reap no benefit by the fraudulent act or forgery of said Poe."

Verdict and judgment against both appellants.

The court committed no error in reference to these instructions, either in giving or in refusing.

The doctrine of the instructions given is expressed in the following proposition, namely: When the name of one of two or more obligors in a bond, note, or other writing obligatory, has been forged, the supposed co-obligor, though a surety only, and though he signed in the belief that the forged name was genuine, is nevertheless bound, if the payee or obligee accepted the instrument without notice of the forgery. This doctrine is supported either directly or in principle by the following authorities: *Veazie v. Willis*, 6 Gray, 90; *The York County M. F. Ins. Co. v. Brooks*, 3 Am. Law Reg. N. S. 399 (Me.); *Franklin Bank v. Stevens*, 39 Me. 532; *Stoner v. Millikin*, 85 Ill. 218; *Selser v. Brock*, 3 Ohio St. 302; *Bigelow v. Comegys*, 5 Ohio St. 256; *Hagar v. Mounts*, 3 Blackf. 57; *Harter v. Moore*, 5 Blackf. 367; *Carr v. Moore*, 2 Ind. 602; *The State, ex rel., v. Van Pelt*, 1 Ind. 304; *Deardorff v. Foresman*, 24 Ind. 481; *The State, ex rel., v. Pepper*, 31 Ind. 76; *Craig v. Hobbs*, 44 Ind. 363; *Brandt Suretyship*, sec. 358.

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The appellants insist on a contrary doctrine, relying mainly for authoritative support upon the case of *Seely v. The People*, 27 Ill. 173. That case goes fully to the extent claimed for it, but it was confessedly decided without citation or knowledge of any supporting authority, and has recently been expressly overruled by the case of *Stoner v. Millikin*, *supra*, which, besides a citation of adjudicated cases, is supported by reasons much more satisfactory and conclusive.

Counsel have referred us to the remarks of Judge REDFIELD, in 3 Am. L. Reg. N. S. p. 404, in a note to *Insurance Company v. Brooks*, *supra*, wherein he says: "We confess to a strong inclination, in questions affecting specialties and simple contracts not negotiable, to favor the English rule. It seems to us that too many of the American cases, in striving to require good faith and diligence of the obligor or promisor, have quite too much overlooked the corresponding obligations on the part of the obligee. We can see no good reason why the obligee, who, in accepting the bond, trusts to the representations of the principal obligor as to the execution of the instrument by the others, who are known to stand as mere sureties, should be any more entitled to screen himself from the consequences of those representations proving false, than should the obligor. The true rule in such case seems to be that each party may stand upon *the facts of the case*, unless he has been guilty of *fraudulent* misconduct. This is certainly the present English rule upon the subject, and the one which we believe will ultimately prevail in this country."

The English cases cited can hardly be said to go so far. But, suppose it be granted that each party may stand on the facts of the case, what meaning shall we attach to the phrase, and what consequences must follow? More can hardly be intended than that, in the absence of fraudulent conduct or intent on his part, the surety who signs after a

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forged name shall be deemed to have been no more and no less careless than the obligee who accepts the paper with the forged name thereon, and neither shall be deemed to have owed any duty to the other to detect and expose the false signature. In other words, they stand, on the facts of the case, alike deceived and alike blameless or in fault. What are the consequences as to their rights under the contract? Shall the surety be discharged, and the obligee get nothing? It will not do to say that the *consideration* on which the surety signed has failed in any part. The consideration as to him, as well as the principal debtor, moved from the creditor, and is in no degree diminished. But, if we confound consideration with motive or inducement, it still may not be said to have wholly failed, because, in the language of Judge REDFIELD, in note to *Seely v. The People*, 2 Am. L. Reg. N. S. 346, "he is supposed to have assumed the obligation, in part, at least, upon the credit of the party for whom he became surety," and can not have relied on his supposed co-obligor for more than a contributive share of the liability.

The plain solution of the question, in accordance with legal principles and natural justice, is that the parties will be left in the predicament into which they have voluntarily come, and neither being able to claim that he was misled or deceived by the other, their contract will be enforced as they made it. There is no equity in the case which can interrupt the course of the law.

There is nothing in the claim of counsel, that Poe was the agent of the plaintiff in procuring the execution of the notes in suit; and that, therefore, the second instruction given was wrong, and that the eighth one requested should have been given. It is not true, as is assumed, that if a creditor sends notes, "either filled up or not filled up as to the amount of the same," to his debtor, with a request that he get security on them, the debtor becomes, for the purpose of getting the security, the agent of the creditor. This is too plain to

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admit of argument. No authority is cited in support of the position advanced, and we deem it quite improbable that there is any.

It is claimed that the court erred in modifying the ninth instruction requested on behalf of the appellants. We give enough of the instruction to show the point: "If Helms, on the first trial of this cause, testified that he believed his signature to the notes was genuine, in the mistaken belief that the notes in suit were the first set of notes sent by Poe to the plaintiff, and on that trial there was no testimony given by Poe or others disclosing the fact that the plaintiff claimed to have had two sets of notes with Helms' signature to them, then such testimony by Helms should (not impair his testimony now in denying the genuineness of his signature.)" Instead of the words in parenthesis, it is claimed that the court inserted and gave the following, viz.: "be considered by you in determining whether Helms' testimony, as then given, was in conflict with his present testimony."

If the question were properly before us we would not hesitate in approving the action of the court in this respect. It is proper generally, that the court instruct a jury that they may consider a fact or an item or items of evidence in determining a question to which the fact or evidence is pertinent; but, as a general rule, it is not proper for the court to instruct what the evidence or any part of it proves. That is to be determined by the jury. *Canada v. Curry, ante*, p. 246.

The question, however, is not in the record. The 325th section of the code provides that "A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions; but it shall be sufficient to write at the close of each instruction, 'refused and excepted to,' or 'given and excepted to,' which shall be signed by the party or his attorney." This provision does not in terms apply to exceptions taken to the modification of instructions, and it is not clear but the better interpretation

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would require a bill of exceptions, in order to save any question in reference to such modifications. However, in the cases of *Patterson v. The Indianapolis, etc., Plank Road Co.*, 56 Ind. 20, and *Wallace v. Goff*, 71 Ind. 292, it is indicated that it will be deemed enough to write at the close of the modification the words, "Modification given and excepted to," signed by the appellants or their attorneys. But the words which it is claimed were inserted and excepted to in the case at bar are not signed or authenticated either by the court or attorneys.

We find no error in the record. The judgment of the circuit court is therefore affirmed, with costs.

No. 7041.

FOUTY ET AL. v. MORRISON ET AL.

PARTITION.—*Sale of Property Free from Mortgage and Judgment Liens.*—*Transfer of Liens to Proceeds of Sale.*—In a suit for partition of real estate, the court ordered the property to be sold, and the proceeds of such sale, after payment of costs, be paid into court, subject to the further order of the court and the rights of the mortgage and judgment creditors in and to the same.

Held. that such order must be construed to mean that the commissioner should sell the land free from the mortgage and judgment liens, and that such liens should be transferred to and satisfied from the proceeds of such sale as the court might thereafter direct.

PRACTICE.—*Questions Reserved.*—*Statute Construed.*—Under sections 347 and 348 of the code, only questions of law decided by the trial court can be reserved for appeal to the Supreme Court.

SAME.—*Bill of Exceptions Must Contain all the Evidence.*—The Supreme Court will not reverse a judgment upon any question as to the weight or sufficiency of the evidence, where the bill of exceptions fails to show that it contains all the evidence produced at the trial.

From the Shelby Circuit Court.

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T. B. Adams and *L. T. Michener*, for appellants.

N. B. Berryman and *H. C. Morrison*, for appellees.

Howk, C. J.—On the 23d day of November, 1875, Nancy Fouty and Thomas J. Fouty, her husband, filed their complaint in partition against Evaline Fouty and others, in the court below; in which complaint they alleged, in substance, that the plaintiff Nancy Fouty was the owner in fee simple of the undivided two-fifteenths of the real estate therein described, in Shelby county, Indiana; that the defendant Evaline Fouty was the owner in fee simple of the undivided one-third of said real estate; and that the defendants Jane Fouty, Emily Shadley, Mary E. Fouty and Amos Fouty, were each the owner in fee simple of the undivided two-fifteenths of said real estate. Wherefore, etc.

Afterward, on the 6th day of March, 1876, Martha Ripple, John Ripple, George Ripple, Martha E. Phillips and Pleasant Howlett, upon their own application, were made defendants to the action, on the ground that they jointly were the owners in fee simple of the undivided one-fifth part of the real estate in controversy; and they filed their answer and cross complaint, asserting their title to and interest in said real estate, alleging that the same was not susceptible of division without damage to the parties, and praying for the sale thereof by a commissioner, under the order of the court. On the 26th day of October, 1876, the original defendants to the action, having each been duly summoned to answer the original complaint, were severally called and each made default.

On the 6th day of January, 1877, the cause, being at issue, “by agreement of the parties,” was submitted to the court for trial and judgment; and a finding was made, that the plaintiff Nancy Fouty, and the defendants named in her complaint, and the said cross complainants were the owners in fee simple, as tenants in common, of said real estate, set-

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ting out their respective interests therein ; that the said Nancy Fouty's interest in said realty was discharged from the lien of a certain mortgage to one Lydia A. Randall ; that the interests of said Martha Ripple and the other new defendants were free from any incumbrance on the realty, except the taxes thereon ; and that the said real estate was not susceptible of division without material injury to the owners thereof. Thereupon judgment was rendered for the sale of said real estate, prescribing the notice, terms, etc., of such sale, and appointing one John R. Sedgwick a commissioner to make such sale, and directing that the proceeds of such sale, after the payment of just costs and expenses, should be paid into court by said commissioner, "subject to the further order of the court, and the rights of the mortgage and judgment creditors of the parties in and to the same."

Afterward, on July 7th, 1877, the said Sedgwick, commissioner, made his written report, duly verified, that, pursuant to said order of sale, he had, on that day, offered and sold at public auction the said real estate, in fee simple, to the said George C. Morrison for the sum of \$2,133.60, that being the highest and best bid made therefor, and two-thirds of the appraised value thereof ; of which sum said Morrison had paid \$711.20 in cash, and for the residue had given his two notes in equal sums, with approved security, and payable respectively with interest in nine and eighteen months from day of sale ; that before his said sale the said Morrison had purchased the said real estate at a tax sale by the county treasurer, for delinquent taxes thereon ; and that out of the cash payment of \$711.20 he had allowed and paid the said Morrison, in the redemption of said realty from said tax sale, the amount due thereon, to wit, the sum of \$182.72, leaving a balance of \$528.48 of the cash payment in his hands.

On said 7th day of July, 1877, the said George C. Morrison filed his verified petition in said cause, representing that he had become the purchaser of said real estate, at the com-

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missioner's sale thereof, under the order of the court ; that, by said order and the terms of said sale, all existing liens on said real estate were to be paid out of the proceeds of the sale thereof ; and he asked the court to reform its order so that the commissioner might be directed and required to pay, out of the proceeds of the sale of said real estate, the liens thereon in the order in which they occurred, first discharging the prior liens ; that he should then apply the said Nancy Fouty's share of the money in his hands as commissioner, on the note and mortgage of Love and Conner, and of Hord and Blair ; that the said commissioner should be directed to apply the moneys in his hands, belonging to all the other parties to the suit, except the heirs of Henry Ripple, deceased, on the note and mortgage of Lydia Randall ; and that the court direct the payment of all existing liens on said real estate.

Thereupon the court approved, ratified and confirmed the sale of said real estate to said Morrison by said commissioner ; and the court granted the prayer of said Morrison's petition, and, pursuant thereto, required and directed the commissioner, out of the proceeds of said sale, to pay off and satisfy all existing liens on said real estate.

Afterward, on October 1st, 1877, all the parties to the original action, plaintiffs and defendants, appeared by counsel and filed their written motion, for certain reasons therein stated and verified, to vacate the order of the court confirming the commissioner's report of sale, and to direct him to correct his report of sale, and to charge himself therein with one-third of the purchase-money of said real estate, and to vacate, set aside and annul the order of the court requiring the said commissioner to pay off and discharge said mortgage and other liens, and for all other proper relief. The other parties to this action, the commissioner Sedgwick, and the purchaser Morrison, appeared and filed affidavits in response to said motion of the appellants, who also filed

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additional affidavits in support of their motion. Upon the hearing of this motion, it was overruled by the court, and to this ruling the appellants excepted; and thereupon they moved the court for a new trial of the matters arising under said motion, and, said motion for a new trial having also been overruled, they also excepted to this decision. The appellants then prayed an appeal from the trial court to this court, "upon a reservation of the questions of law, decided by the court, in overruling the motion to vacate, etc., as aforesaid, which appeal is granted; and thereupon the parties aforesaid notify the court that they intend to take the questions of law aforesaid to the said Supreme Court, upon a bill of exceptions only, showing said ruling and decision and so much of the record hereof and the statement of the court, as will enable the said Supreme Court to apprehend the questions involved."

The following decisions of the circuit court have been assigned as errors, by the appellants, in this court:

1. The circuit court erred in overruling the appellants' motion to vacate the order confirming the commissioner's report of sale, etc.; and,

2. The court erred in overruling their motion for a new trial.

The questions presented in this case for the decision of this court seem to us to arise under the first of these alleged errors, and we deem it necessary to a clear understanding of those questions, and of our decision thereof, that we should set out the substance of the appellants' written motion for the vacation of the order confirming the commissioner's report of sale.

In their motion the appellants showed to the court that, on July 7th, 1877, the commissioner appointed by the court to sell the real estate, of which partition was prayed for in this cause, sold said realty at public auction to George C. Morrison, on the following terms, to wit: One-third of the

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purchase-money in cash and the residue in two equal payments, at nine and eighteen months' credit, the purchaser giving his notes therefor, with sufficient personal surety, waiving valuation laws and bearing six per cent. interest from the day of sale; that the said sale was not made to said Morrison upon any other terms or conditions whatsoever; that at said sale there was no warranty made by said commissioner of a clear and indefeasible title to said land, free and discharged of all liens or incumbrances thereon; that, after making said sale, the commissioner made his report thereof to the court, in which report, mistaking the law and his duties in the premises, among other things he showed that said purchaser had, before that time, bought said real estate at a tax sale, from the treasurer of Shelby county, for delinquent taxes thereon, and had paid therefor at such sale the sum of \$182.72, and that he, the commissioner, had deducted said sum from the cash to be paid by said Morrison to him on his sale of said realty; and the appellants averred that such a disposition of the proceeds of said sale was in violation of the law and contrary to the rights of the parties to this action, and that the commissioner had asked the court to approve and confirm his said report. And the appellants further showed the court that the said sale occurred on the 7th day of July, 1877, just at the hour of the adjournment of the court for its May term, 1877, on the last day of said term; that said report, though purporting to have been made on that day, in fact was not made until afterward, and after the said term had expired by limitation of law; that after the expiration of said term, and after the making of said report of sale, the said Morrison filed a petition for the reformation of an order of the court previously made, which petition purports to have been made on the day of said sale; that the appellants were not present when said report of sale and petition were filed, and that they had no knowledge thereof nor of their contents until long after-

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ward, and that at no time had they consented thereto, or to the prayers and demands thereof; that after the expiration of said term, and the filing of said report and petition, the record was made up and signed, and said report confirmed and said petition granted, as of the last day of said term, of which the appellants had no knowledge until afterward, and to which they did not consent; that, upon granting said petition, the court ordered and directed the commissioner, after the payment of costs and expenses, to apply the balance of Nancy Fouty's interest in the payment of certain liens therein named, and out of the residue of the interests of all the parties, except the interests of Nancy Fouty and of the Ripple heirs, he should apply a sufficient amount to the payment of certain mortgages and other liens therein mentioned; and the appellants averred that the said Morrison bought said real estate subject to all mortgages and judgment liens thereon, and not otherwise, and that the order of the court, in confirming the report as to the deduction of the delinquent taxes from the purchase-money, and the order of the court directing the commissioner to pay off and discharge the aforesaid liens, were illegal and contrary to the rights of the appellants.

Upon the facts alleged, they moved the court to set aside the order confirming the report of sale, and the order directing the commissioner to pay off the existing liens on the realty, out of the proceeds of the sale thereof.

It will be observed that, in this motion, the appellants have found no fault with, and made no objection to, any part or portion of the interlocutory judgment and order of the court, in this case, providing for the sale of the real estate in controversy, upon the ground that it was not susceptible of division without damage to the owners, and appointing a commissioner to make such sale. It follows, therefore, that the interlocutory judgment and order of the court must be regarded, in the consideration and determination of the

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questions presented for decision, as having been agreed to and accepted, in all its provisions, by the appellants as well as the appellees, and as free from mistake or error of any kind. In the closing sentence of the interlocutory judgment and order of the court, in this case, it was provided as follows: "And it is further ordered, adjudged and decreed by the court, that the proceeds of said sale, after payment of just costs and expense herein, be paid by said commissioner into court, subject to the further order of the court, and the rights of the mortgage and judgment creditors of the parties in and to the same."

It seems to us that there is very little room, if any, for doubt in regard to the actual meaning and intention of the court in the language, just quoted, of its interlocutory judgment and order in this case. It was certainly intended by the court that the commissioner should sell the lands in controversy free from the liens thereon "of the mortgage and judgment creditors of the parties," that the proceeds of such sale, after deducting therefrom just costs and expenses, should be paid by said commissioner into court, subject to the liens of such mortgage and judgment creditors, to be paid and satisfied, under "the further order of the court," out of the proceeds of sale, and that the said liens of said creditors, on the real estate, should be transferred to the proceeds of the sale thereof, when so paid into court. This, we think, is a fair construction of the language quoted from the interlocutory judgment and order of the court in this case; and to this judgment and order the appellants, as we have seen, did not object nor except at the time they were rendered and made, nor did they ask, in their motion now under consideration, that the same might be set aside and vacated. The only apparent difference between the interlocutory judgment and order of the court, as we construe its provisions, and the order made after the sale of the real estate, which the appellants moved the court to vacate and set aside,

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is that, in the later order, the commissioner was authorized and directed to pay the mortgage and judgment creditors of the parties, out of the moneys received by him from the sale of the real estate; while, under the interlocutory judgment and order, he had been directed to pay the proceeds of such sale into court, "subject to the further order of the court, and the rights of the mortgage and judgment creditors of the parties in and to the same."

It seems to us, therefore, that the court intended to order, and did order, the real estate to be sold, free from the liens thereon of the mortgage and judgment creditors of the parties to the action, and that such liens should be paid off and satisfied, out of the proceeds of such sale, under the further order of the court.

It will be seen, however, from our statement of this case, that the appellants have appealed to this court "upon a reservation of the questions of law, decided by the court, in overruling the motion to vacate, etc.," the order confirming the report of sale, and the order directing the commissioner to pay off the existing liens on the realty, out of the proceeds of the sale thereof. Such an appeal is authorized, governed and controlled by the provisions of sections 347 and 348 of the code. 2 R. S. 1876, p. 177. Under these sections of the code it is clear, we think, that only questions of law, decided by the trial court, can be reserved and brought, by appeal, to this court. Here lies the difficulty, as it seems to us, with the questions reserved by the appellants in the case at bar. The questions decided by the court, "in overruling the motion to vacate," etc., were questions of fact rather than of law, as is apparent on the face of the motion, the substance of which we have heretofore given. The motion was founded upon, and supported by, divers affidavits, and the allegations of facts in these affidavits were met and controverted in and by certain counter affidavits. The fundamental question presented in the appellants' mo-

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tion was this: Was the real estate in controversy to be sold, or was it in fact sold, under the order of the court, subject to all existing liens thereon? Surely, this was a question of fact and not of law, dependent for its proper answer upon the terms of the order of the court, under which the sale was to be and was made. We have already considered and construed the terms of the interlocutory order and judgment of the court, and we are clearly of the opinion that the court intended to order, and, in legal effect, did order, that the real estate should be sold, free from all existing liens thereon, and that the proceeds of such sale, after the payment of just costs and expenses, should be paid into court by the commissioner, "subject to the further order of the court, and the rights of the mortgage and judgment creditors of the parties in and to the same."

If the trial court, upon the hearing of the appellants' verified motion to vacate, had found the facts alleged therein to be true, questions of law would have arisen thereon which might very properly have been reserved and brought to this court, by an appeal, under the provisions of said sections 347 and 348 of the code. But the record of this cause contains no finding by the court of the truth of the facts alleged in said motion, and we can not assume them to be true; on the contrary, as the case comes before this court, we would be bound to assume that the alleged facts were not true, if such assumption were necessary to the affirmance of the judgment below. We are led to the conclusion that no questions of law have been reserved in the record now before us, and that, for this reason, the first alleged error presents no such question for our decision. *Starry v. Winning*, 7 Ind. 311; *Garver v. Daubenspeck*, 22 Ind. 238; *Love v. Carpenter*, 30 Ind. 284; *Bissell v. Wert*, 35 Ind. 54.

In their motion for a new trial of the questions arising under their motion to vacate, etc., the appellants assigned the following causes therefor:

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1. The decision of the court, in overruling said motion, was contrary to the evidence introduced thereon ;
2. Said decision was not sustained by said evidence ;
3. The decision was contrary to the affidavits read in evidence on the hearing of said motion ;
4. The decision was not sustained by the affidavits read in evidence on the hearing of said motion ;
5. The decision was not sustained by the record of this cause ; and,
6. The decision was contrary to law.

We are of the opinion that no question is presented for the decision of this court by the supposed error of the trial court in overruling the appellants' motion for a new trial of their motion to vacate. The bill of exceptions fails to show that it contained all the evidence introduced by the parties on the trial or hearing of the appellants' motion to vacate. In such a case it may be regarded as settled that this court will not reverse a judgment upon any questions dependent for their decision upon the weight or sufficiency of the evidence ; and these are the only questions presented by the appellants' motion for a new trial in this case. *Railsback v. Greve*, 58 Ind. 72 ; *Brownlee v. Hare*, 64 Ind. 311 ; *Hammon v. Sexton*, 69 Ind. 37.

We find no error in the record of this cause.

The judgment is affirmed, at the appellants' costs.

No. 7119.

MILLER v. ALBERTSON ET AL.

MARRIED WOMAN. — *Contract. — Specific Performance. — Real Estate. —*

Prior to the act of March 25th, 1879, concerning married women, Acts 1879, p. 160, a married woman could not bind herself in any way by an

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executory contract for the sale of real estate, and a specific performance thereof can not be enforced against her heirs.

From the Montgomery Circuit Court.

S. C. Willson and *L. B. Willson*, for appellant.

W. P. Britton and *M. W. Bruner*, for appellees.

NIBLACK, J.—This was an action for a specific performance of a contract for the sale of real estate. The plaintiffs, Oliver Albertson, Ellen Albertson and Mary Ellen Albertson, averred in their complaint, that in September, 1857, the said Oliver Albertson and one William Albertson jointly purchased of Thomas D. Elliott and Sarah Ann Elliott certain lands in Montgomery county, of this State, for the sum of three hundred dollars; that the said Thomas D. Elliott, at the time, executed to the said Oliver Albertson and William Albertson a title bond obligating himself to make a quitclaim deed to said lands, to the obligees, on or before the 25th day of December, 1858, which bond was filed with the complaint; that the purchase of said lands was also made with the said Sarah Ann Elliott, who was the wife of the said Thomas D. Elliott, and with her full knowledge and consent; that it was the understanding of all the parties that she was a party to such contract of sale, and that she did not sign the title bond by reason of neglect and of sickness, with which she became afflicted; that the said William Albertson, on the 7th day of January, 1859, died intestate, leaving the said Ellen Albertson as his widow, and the said Mary Ellen Albertson, as his daughter, surviving him; that on the 2d day of February, 1864, the said Sarah Ann Elliott also died intestate, leaving James Elliott and Elizabeth A. Elliott, who were minors under the age of twenty-one years, surviving her, and without having conveyed, or having made any provision for the conveyance of, said lands in accordance with her said contract for the sale thereof; that the said Thomas D. Elliott, though often requested, had never

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conveyed such lands as he had obligated himself to do by his said title bond; that the said Oliver Albertson and William Albertson had taken possession of the lands so purchased by them, under their contract of purchase, and had made valuable and lasting improvements thereon, and had also fully paid the purchase-money therefor.

James Elliott and Elizabeth A. Elliott, by their guardian *ad litem*, demurred to the complaint for want of sufficient facts, but their demurrer was overruled.

Issue being joined, the court, at its March term, 1867, made a finding for the plaintiffs, and, over a motion for a new trial, decreed a conveyance of the lands in controversy to the plaintiffs, which conveyance was accordingly made by a commissioner duly appointed for that purpose.

The defendant Elizabeth A. Elliott, having in the meantime intermarried with one Charles F. Miller, and having, on the 15th day of May, 1878, arrived at full age, has appealed from the proceedings and judgment, set out as above, and has assigned error upon the overruling of the demurrer to the complaint, and upon the refusal of the court to grant a new trial in the cause. The death of Oliver Albertson has also been suggested, and the proper persons have been substituted for him as parties to this appeal.

The demurrer to the complaint ought to have been sustained. It contained no cause of action whatever against the defendants, James Elliott and Elizabeth A. Elliott, conceding them to have been the children of Sarah Ann Elliott, which was not expressly averred.

No principle of law is better settled than that a married woman could not, previous to the act of March 25th, 1879, concerning married women, bind herself, in any way, by an executory contract for the sale of real estate. *Condit v. The Board of Commissioners, etc.*, 25 Ind. 422; *Davis v. Clark*, 26 Ind. 424; *Stevens v. Parish*, 29 Ind. 260;

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Behler v. Weyburn, 59 Ind. 143; *Williams v. Wilbur*, 67 Ind. 42; *Wooden v. Wampler*, 69 Ind. 88.

The complaint, therefore, failed to show a binding contract upon Sarah Ann Elliott for the conveyance of the lands sued for; hence no obligation resting upon her heirs to make a conveyance could be inferred from the facts alleged in the complaint. The evidence at the trial did not make as strong a case against the defendants, James Elliott and Elizabeth A. Elliott, as did the allegations of the complaint, nor was the title bond introduced in evidence against Thomas D. Elliott, the other defendant.

The complaint was so radically defective, and the proceedings upon it were so erroneous, that we are of the opinion that the judgment ought to be reversed as to all the defendants below.

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

No. 7635.

BALDWIN ET AL. v. THE SCHOOL CITY OF LOGANSPORT.

SUPREME COURT.—*Assignment of Error*.—Where no objection is made, or exception taken, to a judgment, and no motion is made for the taxation of costs, in the court below, no question in relation thereto can be raised in the Supreme Court.

CITIES AND TOWNS.—*School City*.—*Order for Employment of Attorneys*.—*Not Liable when Order Violated*.—On May 31st, 1875, the school trustees of a city made an order authorizing the treasurer of such school board to employ attorneys "to prosecute the county auditor for refusing to pay over moneys" belonging to the school fund of such city. In June, 1875, the city council elected other school trustees, who, on June 3d, qualified and entered upon the duties of their office. On the same day the attorneys employed by the old board filed a complaint in the circuit

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court, praying for a mandate against the auditor of the county to compel him to issue his warrant in favor of the treasurer of the old board for the money then in his hands belonging to said school city. The object of this suit was to determine who were the legal school trustees. The order of May 31st, for the employment of said attorneys, was never revoked by the new board.

Held, that such order only authorized the employment of said attorneys to prosecute the county auditor for failing to pay over the money due from him to the school city, and not to bring a civil suit to try the question as to who were the legal trustees, and that the school city was not liable for the fees of said attorneys for such services.

From the Cass Superior Court.

S. T. McConnell, D. P. Baldwin, M. Winfield and W. W. Thornton, for appellants.

D. B. McConnell, for appellee.

FRANKLIN, C.—This action was commenced by appellants against appellee, in the Superior Court of Cass county, to recover attorney fees for legal services rendered in the Cass Circuit Court, and the Supreme Court of the State, in an action, the result of which is shown by the case of *Blakemore v. Dolan*, 50 Ind. 194. The case was tried by the court, and a finding and judgment for the appellee.

At the request of appellants the court made a special finding of the facts, and the conclusions of law upon them. Appellants excepted to the conclusions of law, and appealed to this court. The following assignment of errors has been filed by appellants, to wit:

1st. The court below erred in its conclusions of law upon the facts specially found by the court;

2d. The court below erred in rendering judgment against the appellants upon their demand, and in taxing appellants with the costs of the suit.

No objections were made or exceptions taken, in the court below, to the judgment, or the form thereof, and no motion was there made in relation to the taxation of costs. There

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is nothing for this court to act upon under the second assignment of errors.

In order to understandingly decide upon the first assignment of errors, it is necessary to state the special findings of the court, which read as follows :

“On the 31st day of May, 1875, William Dolan, Charles B. Knowlton and Archibald McDonald, then the school trustees of the city of Logansport, made and entered of record on order book, of which the following is a copy, to wit: ‘Logansport, May 31st, 1875. Board met at office of William Dolan, at call of president, members all present. Whereas, the county auditor, having repeatedly refused to pay to this board the special school fund belonging to the city of Logansport, it is hereby ordered that the treasurer, William Dolan, employ the law firm of Baldwin & Winfield to prosecute the county auditor, George W. Blakemore, for refusing to pay over moneys, now in his hands, belonging to said special school fund, according to law. The board then adjourned. (Signed) C. B. Knowlton, A. H. McDonald.’ The common council of the city of Logansport, at its first regular meeting in June, 1875, duly elected three school trustees for said city, to wit, Graham N. Fitch, William H. Bringham and Rodney Strain, eligible persons for said offices, who, on the following day, to wit, June 3d, 1875, took an oath of office according to law, met and organized into a school board, elected said Graham N. Fitch president of said board; also elected said Rodney Strain secretary of said board, and also elected said William H. Bringham treasurer of said board. Said Bringham, as such treasurer, and said Strain, as such secretary, on said 3d day of June, 1875, each executed official bonds, according to law, which bonds were, on the same day, duly approved by the county auditor. On the 3d day of June, 1875, the plaintiffs herein, as attorneys for said Dolan, Knowlton and McDonald, filed a complaint in the Cass Circuit Court, praying for a mandate

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against George W. Blakemore, the auditor of Cass county, Indiana, to require him to issue his warrant upon the treasurer of said county, in favor of said Dolan, as treasurer of the board of school trustees of said city of Logansport, for the sum of eleven thousand dollars, then in the county treasury, and collected as special school tax for the school city of Logansport. Upon an order to show cause why a peremptory writ should not issue, said Blakemore filed his answer, to which the plaintiffs in that action, by the plaintiffs, Baldwin and Winfield, as their attorneys, demurred. The court sustained the demurrer. Blakemore excepted and appealed to the Supreme Court of the State, where the decision of the Cass Circuit Court was reversed. The case of *Blakemore v. Dolan*, 50 Ind. 194, is the case here referred to.

“In said complaint for a mandate, filed as aforesaid, in the Cass Circuit Court, the school city of Logansport and said Dolan as treasurer of the board of school trustees of said city, were named as plaintiffs, and George W. Blakemore, auditor of Cass county, was named as defendant. The plaintiffs herein were the attorneys for the appellees in said cause, and for them performed and filed a brief in the Supreme Court. In accordance with the decision of the Supreme Court in said cause, said Dolan, Knowlton and McDonald, in September, 1875, relinquished their claim to the said offices of school trustees of the city of Logansport, and turned over the records and papers pertaining to the same, to said Fitch, Bringham and Strain, said Dolan claiming to act under said order made by the school trustees, as aforesaid, on May 31st, 1875, employed the plaintiffs as attorneys. This employment was prior to June 2d, 1875. Under this employment, the plaintiffs, as such attorneys, spent considerable time and labor in examining the question as to the legal right and duty of the common council of said city to elect all the board of school trustees at their said meeting in June, 1875.

“The services of said plaintiffs as attorneys, in their prep-

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aration for said action, in bringing and conducting the same in the Cass Circuit Court, and in the Supreme Court, were worth the sum of three hundred dollars. During the time of the performance of said service the plaintiffs were partners in the practice of law, doing business in the firm name of Baldwin & Winfield; 2d, the order made May 31st, 1875, for the employment of plaintiffs, was never revoked by the board of school trustees of said city.

“As conclusions of law upon the foregoing facts, the court finds as follows: That the services of the plaintiffs, as attorneys aforesaid, were not rendered for the defendant in this action, but were rendered for Dolan, Knowlton and McDonald, and that the defendant is not, therefore, liable for the payment of the same. Wherefore the court finds for the defendant.

“February 1st, 1878.

EDWIN P. HAMMOND.”

According to the special finding by the court of the facts, as above set forth, the employment of appellants by Dolan was not made under and by the authority of the order of the old board of school trustees, made May 31st, 1875. That order only authorized Dolan to employ the firm of appellants to prosecute the county auditor, for failing to pay over, according to law, the funds in his hands belonging to the school city, and did not authorize him to employ attorneys to commence a civil suit, to try the question as to who were the legal trustees of the school city of Logansport. The finding of the facts does not show that any *prosecution* was ever commenced. But a mandamus proceeding was commenced, the whole management of which, both in the circuit and the Supreme Court, clearly shows that the object of it was to determine who were the legal trustees. No other question was submitted to or considered by the Supreme Court. From the answer of the auditor, we gather that the only question with him was as to whom the warrant should be issued.

The old trustees had no right to use, nor to authorize

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Dolan, their treasurer, to have used, the name of appellee for any such purpose. The employment of appellants was by the old trustees, and the services were rendered for their sole use and benefit.

We see no error in the conclusions of law by the court below.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and is hereby in all things affirmed, at the costs of the appellants.

No. 7572.

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DECEDENTS' ESTATES.—*Administrator De Son Tort.*—*Complaint by Creditor.*—*Pleading.*—In an action by a creditor of a decedent's estate against one who, it was alleged, had wrongfully intermeddled with and converted the personal property of the decedent to his own use, the complaint must affirmatively show that the creditors of the decedent were entitled to have such property go into the hands of an administrator.

SAME.—*Judgment.*—*Penalty.*—In such action, the creditor is not entitled to a personal judgment against the intermeddler, but that he shall account to the court of probate jurisdiction for the full value of the property intermeddled with, and ten per centum thereon.

From the Clinton Circuit Court.

A. E. Paige and *S. O. Bayless*, for appellant.

J. Claybaugh and *B. K. Higinbotham*, for appellee.

ELLIOTT, J.—Matthew D. Cook instituted this action against the appellant, and stated his cause of action substantially as follows: That John Bramwell died on the 2d day of August, 1878; that the deceased in his lifetime was indebted to the appellee in the sum of fifty dollars; that the

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said Bramwell died the owner of personal property of the value of \$336.20 ; that the appellant unlawfully intermeddled therewith, and appropriated it to his own use.

The court did wrong in overruling the demurrer addressed to appellee's complaint by the appellant. The complaint is insufficient, for the reason that it does not affirmatively show that there was personal property which the creditors of the deceased were entitled to have go into the hands of an administrator. The deceased may have had the property mentioned in the complaint, and yet the creditors have had no right to a dollar of it. It by no means necessarily results that, because a man dies the owner of personal property of less value than five hundred dollars, it must go to an administrator, and be distributed to the creditors of the decedent. We can not infer from the fact that the deceased died the owner of personal property of less than five hundred dollars in value, that, therefore, the creditors are entitled to it. There is a premise wanting, without which the conclusion would be entirely unwarranted. It is the business of the pleader to state such premises as warrant the deduction of liability as a matter of law, and courts have no power to supply the omitted premise. The conclusion which we have reached in the present case is substantially the same as that declared in *Ferguson v. Barnes*, 58 Ind. 169, where Howk, J., speaking for the court, said: "We think it is clear, that the appellee should have averred in his complaint every fact necessary to show that he was entitled to the money sued for, or some part thereof."

The statute provides that an *executor de son tort* shall be liable to the "extent of the damages" caused by his unlawful intermeddling. 2 R. S. 1876, p. 495, sec. 15. This is the measure of the liability, for, as the statute specifically provides a remedy, and marks out the limits of the liability, there is no other remedy, and no other liability, than that created by the statute. The person who brings the action

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must, therefore, show some damage, for, under this statute, there is no liability beyond the extent of the damage resulting from intermeddling. A creditor can only show damage by showing that the property intermeddled with was such as an administrator would be entitled to take possession and control of. In the absence of affirmative averments, we can not presume that there was any damage resulting from the act charged against the appellant. For anything that appears, the property never could have rightfully gone into the hands of an administrator.

The court below erred in rendering judgment against the appellant for a specific sum of money. In such a case as the present, the creditor is not entitled to the ordinary *quod recuperet* judgment. The proper judgment is that the intermeddler shall account to the court of probate jurisdiction for the full value of the property intermeddled with, and ten per centum thereon. As was said in *McCoy v. Payne*, 68 Ind. 327, "The liability of such an executor is not to the decedent's creditor, but to the decedent's estate and his personal representatives; and, although the creditor may sue such an executor, he can not recover a personal judgment for his debt, against the executor, but can only compel him to account for the full value of the decedent's property, with which he has unlawfully intermeddled, 'with ten per centum thereon.' "

Judgment reversed, at costs of appellee.

No. 7594.

SOMERBY ET AL. v. BROWN ET AL.

73 353
148 113

PLEADING.—Promissory Note.—Bankruptcy of Makers.—Endorsers.—In an action by the assignee of a promissory note, not payable in bank, against the endorsers, the complaint alleged that, before its maturity, the makers were adjudged bankrupts, in the proper court, and that the matter of their bankruptcy was still pending.

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Held, on demurrer, that such complaint, for want of an averment that there are no assets in the hands of the assignee out of which any part of the note can be paid, is insufficient.

SAME.—*Insolvency of Makers.*—Where a paragraph of the complaint sufficiently avers the insolvency of the makers of said note, at and subsequent to its maturity, but avers nothing as to their bankruptcy, it is necessary to prove, not only that the makers were adjudged bankrupts, but also that no assets came into the hands of the assignee in bankruptcy, sufficient to pay any part of such note.

From the Wayne Circuit Court.

B. F. Harris, for appellants.

C. E. Shively, for appellees.

NEWCOMB, C.—The appellees sued the appellants, Somerby, Jackson and Havens, as endorsers of a promissory note, not payable in bank, executed by Hogshire & Reisner, as makers. The appellees recovered in the circuit court. Two errors are assigned in this court :

1. That the circuit court erred in overruling the demurrer of appellants to the first paragraph of the complaint ;
2. That the court erred in overruling the motion of appellees for a new trial.

The first paragraph sets up the execution of the note and its endorsement to the plaintiffs below by the defendants, and then avers that before its maturity the makers of the note were adjudicated bankrupts by the District Court of the United States for the District of Indiana, and that the matter of their bankruptcy was still pending in said district court.

This was all that was charged touching the insolvency of the makers of the note. It was not averred that no property passed from them to their assignee in bankruptcy, nor that no part of the note could be paid from the estate of the bankrupts.

We think the circuit court erred in overruling the demurrer to this paragraph of the complaint. In *Hayne v. Fisher*, 68 Ind. 158, WORDEN, J., in pronouncing the opinion of this court in a somewhat similar case, said: “We are of

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opinion that the defendant can not be held liable upon her endorsement until the plaintiff has pursued, in a proper manner, the estates of the bankrupt makers of the note, and made what he can from those estates. This he would be required to do if the makers were dead. *Dole v. Watson*, 2 Ind. 177; *Bernitz v. Stratford*, 22 Ind. 320; *Litterer v. Page*, 22 Ind. 337. We can see no difference in principle in the two classes of cases. It is true that a dead man's estate may be sufficient for the payment of all his debts, while it is hardly to be supposed that a bankrupt's estate will be sufficient for that purpose. But it is true that a bankrupt's estate may pay a portion, and a considerable portion, of his debts. The answer, therefore, was sufficient to show that the action was prematurely brought, before the plaintiff had proceeded to file his claim against the estates of the bankrupt makers of the note, for the purpose of obtaining such dividends as those estates might be sufficient to pay."

It is incumbent on a plaintiff, suing as the assignee of a non-negotiable note, to allege in his complaint that he has pursued the maker to insolvency, or that a suit against the latter would have been fruitless, because he had no property subject to execution. *Roberts v. Masters*, 40 Ind. 461. And in cases where the property rights of the maker have passed to an administrator or assignee in bankruptcy, and the complaint so alleges, it is obvious from the foregoing authorities that, to make a good complaint, there must be the further averment that there are no assets in the hands of such administrator or assignee, out of which any part of the note can be paid. It follows that the first paragraph of the complaint was insufficient.

The second paragraph said nothing of the bankruptcy of the makers of the note, but sufficiently averred their insolvency at and subsequent to its maturity. Trial was had by the court on a general denial of the complaint. On the trial the plaintiff proved the matters alleged in the first para-

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graph, and nothing more. Further than introducing record evidence of the adjudication in bankruptcy, the plaintiffs made no attempt to prove the averment of a want of property of the makers of the note sufficient to pay any part of it. If it was necessary to aver in the first paragraph that no assets applicable to the payment of the note, in whole or in part, passed to the assignee under the adjudication in bankruptcy, it was equally necessary, in support of the averments of the second paragraph, to prove that there were no such assets, after giving proof of the adjudication in bankruptcy. As early as the case of *Hardesty v. Kinworthy*, 8 Blackf. 304, the doctrine was laid down that all the property of the maker must be exhausted before recourse can be had to the assignor of a promissory note. It was said in that case, that "The term 'open and notorious insolvency,' * * implies, not the want of sufficient property to pay all of one's debts, but the absence of all property, within reach of the law, applicable to the payment of any debt." Property in possession of an assignee in bankruptcy is not only within reach of the law, but is in the actual custody of the law. The rule announced in *Hardesty v. Kinworthy* has been recognized and followed in *Herald v. Scott*, 2 Ind. 55; *Sering v. Findlay*, 7 Ind. 247; *Dugdale v. Marine*, 11 Ind. 194; *Roberts v. Masters*, 40 Ind. 461; and *Hayne v. Fisher*, 68 Ind. 158.

For error in overruling the demurrer to the first paragraph of the complaint, and in overruling the motion for a new trial, the judgment below must be set aside.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and is hereby, in all things reversed, at the costs of the appellees, and that the cause be remanded to the Wayne Circuit Court for further proceedings in accordance with the above opinion.

Hill v. Mayo.

No. 7630.

HILL v. MAYO.

PROMISSORY NOTE.—Pleading.—Exhibit.—Record.—Evidence.—Presumption.—Supreme Court.—Where, in an action on a promissory note, the record, on appeal to the Supreme Court, shows that the complaint alleged that the note and endorsement were filed with the complaint, and copies thereof follow the complaint in such record, it will be presumed that the clerk properly discharged his duty in making up the record, and its recitals, therefore, are *prima facie* evidence that the note and endorsement were filed with the complaint.

From the Tipton Circuit Court.

J. W. Robinson, for appellant.

J. Green and *D. Waugh*, for appellee.

FRANKLIN, C.—Mayo sued Hill upon a promissory note executed by Hill to Mayo & Shalter, and endorsed by Mayo & Shalter to Mayo.

The defendant filed a demurrer to the complaint, assigning for cause that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and judgment given on demurrer for the plaintiff.

In this court the only error assigned in the proceedings of the court below is the overruling of the demurrer. The complaint is in the usual form upon a promissory note, and alleges that the note and endorsement were filed marked “Exhibit B,” and made a part of the complaint. The record nowhere shows whether either the note or endorsement was filed with the complaint or marked “Exhibit B.” Immediately following the complaint in the record, there appears a copy of a note and endorsement the same as those described in the complaint.

The statute provides that, “When any pleading is founded on a written instrument or on account, the original or a copy thereof, must be filed with the pleading.” 2 G. & H., p. 104.

In the case of *Brown v. The State, ex rel.*, 44 Ind. 222, the following language is used: “The statute is imperative that

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the instrument, or a copy of it, must be filed with the pleading; alleging that it is filed is not enough. It must be in fact filed; and if not, the pleading is demurrable." And quite a number of decisions of this court are referred to in support thereof. In the case of *The Peoria M. & F. Ins. Co. v. Walser*, 22 Ind. 73, Judge PERKINS, in delivering the opinion of the court, uses the following language: "It is further settled that, in order that the court may know that the written instrument is filed with the pleading, as constituting the foundation of the particular action, it must be identified by reference to it, and making it an exhibit in that pleading." In the case of *Brown v. The State, ex rel., supra*, neither the bond nor a copy was filed with the complaint.

The opinion in *The Peoria F. & M. Ins. Co. v. Walser, supra*, appears to be based upon the idea that neither the original nor a copy of the policy sued on was filed with the complaint, without stating what the record showed upon that subject. In this case the record shows that the complaint alleged that the note and endorsement were filed with the complaint, and that a copy of the note and endorsement immediately follows the complaint in the record. The clerk is presumed to have discharged his duty, and copying the note and endorsement in connection with the complaint is *prima facie* evidence that the note and endorsement were filed with the complaint. *Reed v. Broadbelt*, 68 Ind. 91; *Fridde v. Crane*, 68 Ind. 583. We see no error in overruling the demurrer to the complaint.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and is hereby, in all things affirmed, at costs of appellant.

The State v. Davis *et al.*

No. 8667.

THE STATE v. DAVIS ET AL.

73	359
137	444

SUMMONS.—*When Valid.*—Under section 37, 2 R. S. 1876, p. 49, a summons sufficient, in substance, to impart full information that an action has been instituted against the parties designated therein as defendants, is valid.

SAME.—*Omission of Seal.—Amendment Nunc Pro Tunc.—Judgment.*—Under section 37, *supra*, a summons is not void because not attested by the seal of the court; and such court has the right to order the clerk to affix the seal *nunc pro tunc* to a summons issued previous to, and returnable at, a former term, after judgment has been entered and after the term has closed.

SAME.—*Right to Set Aside Default and Judgment.—Sheriff's Return. — Collateral Attack.*—In proceedings to obtain an order for a *nunc pro tunc* amendment of a summons by affixing the seal of the court after judgment in an action, the right to have a default and judgment set aside can not be litigated; nor can the sheriff's return to the summons in said action be contradicted in such proceedings.

From the Montgomery Circuit Court.

G. W. Collings, Prosecuting Attorney, *D. A. Roach* and *A. B. Cunningham*, for the State.

G. W. Paul and *J. E. Humphries*, for appellees.

ELLIOTT, J.—On the 10th day of September, 1879, the clerk of Montgomery county issued against the appellees a summons, perfect in form and substance, except that it lacked the seal of the court from which it issued. There was no appearance by the appellees to the action in which the summons issued, and judgment was entered against them upon default. On the 18th day of November, 1879, the appellant, by her prosecuting attorney, moved, upon proper notice, for an order directing the clerk to attach the seal now for then. The motion is supported by the affidavit of the clerk showing the issuing of the writ, and by that of the deputy sheriff showing due service. Answers were filed by the appellees to the motion or complaint of the appellant, but these were struck out on motion of appellant. Finally, an order was

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made striking appellant's original motion from the docket, and this terminated the proceedings in the court below.

The first question, and really the controlling one, presented by this appeal, is this: Has a circuit court the power to make an order directing the clerk to affix the seal of the court, now for then, to a summons issued previous to, and returnable at, a former term, after judgment has been entered and after such term has finally closed?

It is undoubtedly true, as appellees insist, that at common law a writ issuing from a court must, in order to be entitled to be considered as regular and authentic, be attested by the seal of the court from which it issued. *Williams v. Vanmetre*, 19 Ill. 293; *The State v. Flemming*, 66 Me. 142; *Wheaton v. Thompson*, 20 Minn. 196; *Reeder v. Murray*, 3 Ark. 450. The case of *The Insurance Co. v. Hallock*, 6 Wal. 556, does decide that an order of sale issued by a court of this State was void because not attested by the seal of the court. It has also been held by this court that, where there is no statute to the contrary, a writ or record must be attested by the seal of the court from which it comes. *Jones v. Frost*, 42 Ind. 543; *Hinton v. Brown*, 1 Blackf. 429; *Sanford v. Sinton*, 34 Ind. 539. The older cases did hold that a writ lacking the seal of the court was absolutely void, but there is much conflict upon this point among the modern cases, many of them holding that such a writ is not void, but merely voidable. Our court long since held that such a writ was not void.

It is true, as argued by appellees, that a summons, so clearly defective as to be insufficient to confer jurisdiction, can not, after judgment, be so amended as to give jurisdiction. If a summons without a seal be conceded to be void, then there can be no amendment, for it is axiomatic that a void thing can not be amended.

The liberal provisions of our statute, respecting the summons, would take such writs from under the old common-

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law rule, even if it were conceded that it is the rule which must be adopted respecting other writs. The provisions of the code upon this subject are contained in article four, and the provision which directly bears upon this point is found in section 37, and is as follows: "No summons, or the service, shall be set aside, or be adjudged insufficient, where there is sufficient substance about either to inform the party on whom it may be served, that there is an action instituted against him in court." We think it very clear that the omission to affix the seal does not prevent the writ from imparting to the parties against whom it is issued, and that very fully and distinctly, information that an action is instituted against them. The seal would afford no information; its office is merely to attest the authenticity of the writ. The absence of the seal does not take from the substance of the writ anything essential to the information which our code provides that it shall give the parties against whom it issues. There is certainly sufficient substance about a summons, which is defective only in the single particular that a seal is lacking, to impart full information that an action has been instituted against the parties therein designated as defendants. A summons which is sufficient in substance to do this, is valid under our statute. This was so held in *Boyd v. Fitch*, 71 Ind. 306, and we are well satisfied that the ruling was entirely correct. We hold that, under our code, a summons is not void because not attested by the seal of the court, and that the court has the right to order the clerk to affix the seal now for then. *Miller v. Royce*, 60 Ind. 189; *Newhouse v. Martin*, 68 Ind. 224.

The appellees, by their assignment of cross errors and by their brief, ask us to consider and reverse the ruling of the court striking out their answer and cross complaint. The pleading of appellees alleges that the defendants were called and defaulted on the 25th day of September, 1879; that "no valid summons" was served on the appellees; that judgment

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was rendered against them ; that, when notice of the motion was served, they were preparing to have such default and judgment set aside. The only relief sought by the appellant was an order for the *nunc pro tunc* amendment of a writ, and upon such a motion the right to have a default and judgment set aside could not be litigated. But, if it could have been, the appellees' pleading was bad, because it contradicted the sheriff's return to the writ in the action in which judgment was entered, and this could not, certainly in such a proceeding as the present, be rightfully done. *Splahn v. Gillespie*, 48 Ind. 397.

It is true, that the pleading avers that "no summons was ever issued by the clerk of the court under the seal of the court ;" but, as this is precisely what the appellant's motion admits, there was no issue presented. In other parts of the pleading it is alleged that "no valid summons was issued or served." This is an insufficient allegation, because it is a mere negative pregnant. The negation implies the service of a writ invalid only because it lacked a seal. *Pomeroy Remedies*, sec. 618.

The court erred in striking appellant's motion from the docket, but did not err in striking out the appellees' answers. Judgment reversed, at costs of the appellees.

No. 7614.

CHISHAM ET AL. v. WAY ET AL.

PARTITION.—*Sale of Real Estate.*—*Disposition of Proceeds.*—Where real estate, in a proceeding for partition, is sold, the court should order the proceeds to be divided among the parties, according to their respective interests.

SAME.—*Erroneous Order.*—*How Cured.*—*Trustee.*—*Widow.*—A. died seized of certain real estate, leaving a widow, by whom he had no children, and two children by a former wife, and such real estate. in a proceeding for partition, was sold.

Held, that where the court appointed a trustee to take charge of one-third of the proceeds of said sale for the benefit of the widow, and

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133	390
73	362
134	187

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afterward erroneously ordered said fund to be paid to her, but the record is not in a condition to enforce such order, equity will retain the fund in the hands of the trustee, to be rightfully divided on the application of any party in interest.

PRACTICE.—Appeal.—Record.—Complaint.—Where the record shows that an amended complaint was filed in the court below, but such amended complaint is nowhere found in the record, no question thereon is presented on appeal to the Supreme Court.

From the Orange Circuit Court.

J. Baker, for appellants.

M. B. Williams, for appellees.

BEST, C.—This action was brought by the appellants, against the appellees. A condensed statement of the facts, as disclosed by the answer and reply, is necessary in order to understand the questions involved.

It appears that one Anderson Way died intestate, seized of certain real estate in Orange county, Indiana, leaving Jesse Way and Louisa Sanders, his only children by a former wife, and leaving Nancy Chisham, his widow, by whom he had no children. Afterward, at the — term, 1865, of the Orange Circuit Court, said Jesse and Louisa commenced a suit against said Nancy for the partition of said land, alleging that they each owned the undivided one-half thereof, subject to her life-estate in one-third of it, and averring its indivisibility. The said Nancy filed an answer, averring that the land could not be divided, and asking the appointment of a commissioner to sell it; David Jones was appointed, and, at the October term, 1865, reported that he had sold it to said Nancy. This sale was confirmed, and John Laswell was appointed, by the court, a trustee to take charge of the one-third of the proceeds of said sale. Afterward, and on the 3d of November, 1865, the one-third of the net proceeds of said sale were paid by the commissioner to said trustee, and he, on the same day, loaned the same to said Nancy, who gave her note, payable one day after date, with John Sanders and William B. Chisham, her co-appellant, as her sureties. Af-

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terward, and at the February term, 1867, the commissioner reported the purchase-money fully paid, and the court ordered a deed made, and one-third of the money paid to said Nancy, and the balance to said Jesse, who had, before that time procured an assignment of his sister's portion. From time to time thereafter, the interest was adjusted until in July, 1877, when said Laswell brought suit on said note in the Orange Circuit Court, and recovered a judgment against the makers thereof for \$930.52. On the 27th of October, 1878, an execution was issued on this judgment, and was levied on the land of William B. Chisham, and this suit was brought on the 20th day of November, 1878, to compel Laswell to account as the trustee of said Nancy, to obtain a satisfaction of said judgment, and to enjoin its collection on the ground that said Nancy was the beneficiary thereof. Afterward, on the 22d day of November, 1878, the plaintiffs filed an amended complaint, but this complaint does not appear anywhere in the record. To this complaint the defendants filed an answer of three paragraphs. The appellants demurred to the second and third paragraphs, because neither of them stated facts sufficient to constitute a defence. The demurrer was sustained to the second and overruled to the third, to which the appellants excepted. A reply was filed, the cause submitted to the court for trial, and a finding made for the appellees.

The appellants moved for a new trial, because the decision of the court was not sustained by sufficient evidence, and was contrary to the law. This motion was overruled, and exception reserved. Final judgment was rendered for the appellees. From this judgment the appellants appeal, and assign as error here:

1st. That the court erred in overruling their demurrer to the third paragraph of the defendants' answer.

2d. That the court erred in refusing them a new trial.

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From this statement it is evident that the whole dispute is about the money placed in the hands of Laswell in the partition proceeding. On the one hand, it is claimed that the whole of it belongs to the appellant Nancy, by virtue of the final order in that proceeding; and, on the other hand, it is claimed that none of it belongs to her, but only the use of it during her life. Unless some order made in that proceeding, or in this one, concludes the parties, the position of neither is correct. This money arose from the sale of land which was owned by the appellant Nancy, and the appellees Jesse and Louisa. The former held an estate for her life, and the latter the estate in remainder. When the land was sold, the court should have ascertained the share of each, and directed its payment to them respectively. This was not done, but instead thereof the court appointed a trustee to take and keep the fund. Thus far no division was made, and each remained interested in the fund, as they had been in the land from which it was derived. The trustee, in pursuance of the order of the court, took control of the fund. Afterward, the court ordered the commissioner to pay the whole of it to the appellant Nancy, and in this case the court below adjudged it to be rightfully held by the trustee. Both orders were wrong, and so are the positions of both parties. If the record was in shape to enforce the final order in the partition proceeding, it would result in manifold injustice to the appellees Jesse and Louisa; and if the record in this cause fixed the right of the trustee, Laswell, to hold the money during the life of the appellant Nancy, it would result in manifest injustice to her. Fortunately, however, these records do not conclude either party, and justice under the forms of law may yet be done to all. The judgment below is the last adjudication upon the right of appellant Nancy to the whole of the money. It is conclusive upon her, and results in keeping the fund intact, to be hereafter divided

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between the parties according to their respective interests therein. Thus justice, twice invoked, but not fully administered, will retain this fund where, upon the application of either party, such order can be made as should have been made upon the conclusion of the partition proceedings. This much we deemed proper to say, as it seems to us that substantial justice has been done between the parties, and if it is not a complete determination of their rights, it, at least, fixes the fact that the money is a common fund that may hereafter be divided at the instance of either party, according to their respective rights therein.

The appellant, however, insists that the judgment below is erroneous for the reasons assigned. This depends upon whether or not the record presents them. The original complaint was filed on the 20th day of November, 1878, which was the third judicial day of the November term, 1878, of the Orange Circuit Court. Afterward the record contains this entry: "And again on the 5th judicial day of the said November term, 1878, of said court, the following proceedings were had in said cause, to wit: Come now the plaintiffs and file their amended complaint herein." But this complaint is not found anywhere in the record.

The third paragraph of the answer, to which appellants' demurrer was overruled, was filed to this complaint. Without a complaint the record presents no error on behalf of an appellant who was a plaintiff below, as was decided in *Heizer v. Kelly*, *post*, p. 582, and for the reasons there given.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and is hereby, in all things, affirmed, at the costs of appellants.

The City of Lafayette v. Larson et ux.

No. 7599.

THE CITY OF LAFAYETTE v. LARSON ET UX.

73	367
124	484
73	367
143	428

CITY.—Damages.—Defective Sidewalk.—Pleading.—In a suit against a city for damages for injuries resulting from a defective sidewalk, the complaint averred that, on, etc., “and for six months immediately previous thereto, the defendant did, wilfully and knowingly, allow and permit its sidewalk” (describing it) “to become and remain rotten, decayed, defective, and out of repair.”

Held, on demurrer, that the complaint was sufficient.

SAME.—Street.—When a street, within the limits of a city, is in common use by the people, it is the duty of the city to keep it in a reasonably safe condition for ordinary travel.

EVIDENCE.—Verdict of Jury.—Where there was evidence before the jury tending to sustain the verdict, the Supreme court will not disturb it.

SAME.—Husband and Wife.—Where a husband and wife sue or are sued jointly, and have separate interests, each is a competent witness.

CITY.—Notice.—Notice to a street commissioner, or to a member of the common council of a city, of the defective condition of a sidewalk, is notice to the city.

SAME.—Notice in such cases may be proved by actual notice to the proper officers of the city whose duty it is to attend to municipal affairs, or facts and circumstances may be shown from which notice may be inferred.

INSTRUCTIONS.—Practice.—Instructions given by the court, of its own motion, do not constitute a part of the record, unless signed by the judge, or made part of the record by bill of exceptions.

SAME.—Where instructions to a jury are not numbered or divided into distinct propositions, an exception to any part of them can be reserved by excepting to all collectively.

SAME.—Negligence.—Notice.—Knowledge.—In such action the court instructed the jury, that if the plaintiff, Mrs. L., was not in fault, and the injury occurred through the negligence of the city in allowing its sidewalk to remain out of repair, she would be entitled to damages; but if she knew of the defect in the sidewalk, and walked thereon recklessly, without ordinary care and prudence, she did it at her peril; but if the sidewalk was notoriously out of repair, and she had occasion to walk over it, these facts alone would not allow the jury to draw the inference that she knew of the defect, but she must have personal knowledge thereof; that it was for the jury to determine from the evidence whether she had such personal knowledge or not; that if they found such defect a notorious one, and that she occasionally walked over the sidewalk, these were facts which they might properly consider in determining whether she had such personal knowledge.

Held, that the whole instruction, taken together and in connection with the evidence, is substantially correct.

The City of Lafayette v. Larson *et ux.*

From the Tippecanoe Superior Court.

J. A. Stein, for appellant.

J. R. Coffroth and *C. B. Stuart*, for appellees.

BICKNELL, C.—This was a suit by husband and wife to recover damages for injuries suffered by the wife from a fall upon a defective sidewalk in one of the streets of the city of Lafayette.

Demurrers were filed to the complaint for misjoinder of causes of action, and to each paragraph of the complaint for want of a sufficient cause of action. The demurrers were overruled, an answer was filed in denial, and the cause was tried by a jury. No instructions were demanded by either party. The court of its own motion gave the jury a general charge, and a verdict was returned for the plaintiff with one thousand dollars damages. The appellant moved for a new trial, and filed the following reasons therefor:

First. Said verdict is not sustained by sufficient evidence, and is contrary to law;

Second. The damages are excessive;

Third. Error of law at the trial, as follows: A. The court erred in permitting Sarah Larson to testify over the appellant's objection. B. The court erred in permitting Jacob Hilt, George H. Williams and Reason Newman, to testify that, before the alleged accident, they had severally notified the street commissioner of said city, and two of its common councilmen, of the defective condition of said sidewalk. C. The court erred in permitting Jacob Hilt to testify that he had repaired said sidewalk under the direction of the street commissioner of said city and one of its common councilmen. D. The court erred in refusing to allow the appellant to ask said Sarah Larson whether the plaintiffs had ever requested the defendant to pay any of the damages sued for. E. The court erred in each and all of its instructions given to the jury in the final charge of the court.

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The motion for a new trial was overruled, and judgment was rendered upon the verdict. Errors were assigned as follows :

First. The court erred in overruling the demurrer to the complaint ;

Second. The court erred in overruling the motion for a new trial.

The alleged error in overruling the demurrer for misjoinder of causes of action is waived by the appellant. The only objection urged by the appellant against the sufficiency of the complaint is that it fails to show "that the injuries occurred upon an improved street of the city." The common council has exclusive power over the streets, highways, alleys and bridges within a city. 1 R. S. 1876, p. 300. When a street within the limits of a city is in common use by the people, it is the duty of the city to keep it in a reasonably safe condition for ordinary travel. *The City of Indianapolis v. Gaston*, 58 Ind. 224. This is true whether the street be what is technically called an improved street or not. It is a partial improvement of a street to build a sidewalk upon it.

Each paragraph of the complaint has the following averment upon the point now under consideration :

"That on the 1st day of July, 1878, and for six months immediately previous thereto, the said defendant did, wilfully and knowingly, allow and permit *its* sidewalk, on the southeast side of Kossuth street, within the limits of said city, between Oak street and the Dayton gravel road, to become and remain rotten, decayed, defective, and out of repair," etc.

This averment shows that said street was one which the city was bound to keep reasonably safe for ordinary travel. *Lowrey v. The City of Delphi*, 55 Ind. 250 ; *Higert v. The City of Greencastle*, 43 Ind. 574 ; *Grove v. The City of Fort Wayne*, 45 Ind. 429. We are satisfied that each paragraph

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of the complaint was good, and that there was no error in overruling the demurrers thereto.

The first reason alleged for a new trial is that the verdict was not sustained by sufficient evidence, and was contrary to law. The appellant's counsel in his brief insists that the evidence shows contributory negligence on the part of the appellees, and this is his only objection to the sufficiency of the evidence. We have examined the testimony. There was evidence before the jury tending to sustain the verdict, and where this is the case the verdict ought not to be disturbed by this court. *Grant v. Westfall*, 57 Ind. 121.

The second reason alleged for a new trial, to wit, that the damages were excessive, is waived by the appellant.

The third reason for a new trial, to wit, error of law on the trial, embraces several particulars:

First. That the court permitted Sarah Larson to testify, she being the wife of her co-plaintiff. There was no error in this ruling. The general rule is that neither husband nor wife can testify for or against each other, yet, when they jointly sue, or are jointly sued, and have separate interests, each is a competent witness, although the testimony may benefit the other. *Nicklaus v. Dahn*, 63 Ind. 87, and the cases there cited.

Second. It is alleged as error, on the trial, that the court allowed several witnesses to testify to having separately notified the street commissioner and two of the common councilmen of the city of the defective condition of said sidewalk. There was no error in this ruling. Notice, in such cases, may be proved either directly or inferentially. It may be proved by actual notice to the proper officers of the city, whose duty it is to attend to municipal affairs, or facts and circumstances may be shown from which notice may be inferred. *Colley v. The Inhabitants of Westbrook*, 57 Me. 181; *Ham v. The Inhabitants of Wales*, 58 Me. 222. See, also, *Donaldson v.*

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The City of Boston, 16 Gray, 508 ; *The City of Ripon v. Bittel*, 30 Wis. 614, and 2 Dillon Munic. Corp., sec. 790.

Third. It is further alleged as error on the trial that the court allowed a witness to testify that he, under the direction of the street commissioner and one of the common councilmen of said city, had made repairs upon said sidewalk. There was no error in this. It appeared that the bad condition of the sidewalk was notorious ; that the citizens were complaining of it ; that complaints were made to the street commissioner and to Mr. Marks, the councilman from that ward of the city, and that they examined the sidewalk, and caused the repairs to be made. The testimony objected to was competent, as tending to prove that the city had notice, and as tending to prove that the city had control of the sidewalk, and had undertaken to put it in order.

Fourth. The fourth matter charged as error on the trial, to wit, that the court refused to permit the appellant to ask Sarah Larson "whether the plaintiffs had ever requested the defendant to pay any of the damages sued for," is not mentioned in the brief of the appellant, and may, therefore, be regarded as waived.

Fifth. The last matter alleged as error on the trial is, "that the court erred in each and all of its instructions given to the jury, constituting the final charge of the court." It was held in *Hersleb v. Moss*, 28 Ind. 354, that where, as in this case, instructions to a jury are not numbered nor divided into distinct propositions, any exception to any part of them may be reserved by excepting to all collectively. Instructions given by the court, of its own motion, are not part of the record unless signed by the judge, or made part of the record by bill of exceptions. *Newby v. Warren*, 24 Ind. 161. The instructions now under consideration do not appear to have been signed by the judge, but the bill of exceptions shows the proper exception, taken at the proper time, and the instructions are set out in the bill. There-

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fore, the point made by the appellee, that the instructions are not properly in the record, because they are not signed by the judge, can not be sustained. The appellees make the further point, that the last alleged reason for a new trial is too vague and uncertain. We think this point is not well taken. In *Estep v. Larsh*, 21 Ind. 183, several instructions were given and excepted to thus: "to the giving of which instructions, and each paragraph thereof, the defendant immediately excepted." In the motion for a new trial, the objection was stated thus: "The court erred in the instructions given to the jury." The court held, on the authority of *Robinson v. Hadley*, 14 Ind. 417, and *Elliott v. Woodward*, 18 Ind. 183, that the reason for a new trial was insufficient because it failed to point out with reasonable certainty the part of the instructions claimed to be erroneous. In the case at bar, however, the reason assigned is that each one of the instructions was erroneous; and in this there is no uncertainty. We can not refuse to consider the instructions. The only points in the instructions, to which the appellant in his brief directs our attention, are, first, the instructions in reference to the proper notice to the city of the defective condition of the sidewalk. These are as follows:

"But the city must have notice of the defect in the streets or alleys. That notice may be given in several ways—in two ways, at least—if you should find from the evidence given in the case, that the street commissioner or some members of the city council had notice of the defect, I instruct you that notice to these officers of the city is notice to the city itself. If you should believe from the evidence that the defect was an open and notorious one, and had been in existence for a considerable length of time, you may infer notice from those facts. If it had been in existence so long a time as to raise the inference that the proper officers of the city, by the exercise of due diligence, might have known of the defect, then from that you may infer that the city

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had notice of the defect.” We find no error in this part of the instructions, and it is substantially in accordance with the authorities heretofore cited in this opinion.

Second. The other objection taken by the appellant to the instructions has reference to the question of contributory negligence on the part of the appellees. The entire instruction, to a part of which the appellant objects, is as follows :

“Then, gentlemen, if you find these facts concurring : First. That the injury was received, as alleged in the complaint ; Second. That the plaintiff, Mrs. Larson, was not in fault, that is, that the injury was not received through her negligence or fault, but came through the negligence of the city in allowing the sidewalk to remain out of repair ; then the plaintiffs have made out their case, and would be entitled to recover damages. I have said it must have been without fault on her part. If she knew there was a defect in the sidewalk where she was walking, and yet walked over that sidewalk recklessly, and without ordinary care or prudence to the danger of her life or limbs, she did it at her own peril ; but if it be true that the sidewalk was notoriously out of repair, and the plaintiff had occasion to walk over it, these facts alone would not allow you to draw the inference that she knew of the defect. She must have had personal knowledge of the defect in the sidewalk, and it is for you to determine from the evidence given before you, whether she had or had not such personal knowledge of the defect. If you find the defect was a notorious one, and also that the plaintiff did occasionally walk over the sidewalk, these are facts which you may properly consider in determining whether she had personal knowledge of the defect.”

The part of the above instruction to which the appellant objects is the following : “But if it be true that the sidewalk was notoriously out of repair, and the plaintiff had occasion to walk over it, these facts alone would not allow you

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to draw the inference that she knew of the defect. She must have had personal knowledge of the defect in the sidewalk, and it is for you to determine from the evidence given before you, whether she had or had not such personal knowledge of the defect." The whole instruction, however, must be taken together, in connection with the evidence in the case, and, so considered, we think there is no error in the instruction which will warrant the reversal of the judgment. "Personal knowledge" means knowledge brought home to the party as distinguished from mere general notoriety, which might never reach the party.

As to the instruction, "that if the sidewalk was notoriously out of repair, and the plaintiff had occasion to walk over it, these facts would not allow you to draw the inference that she knew of the defect," if this instruction, standing alone, would take from the jury the right to draw inferences from the evidence in relation to the knowledge of the party, it was cured by the subsequent instruction in these words: "If you find the defect was a notorious one, and that the plaintiff did occasionally walk over the sidewalk, these are facts which you may properly consider in determining whether she had personal knowledge of the defect." *Gronour v. Daniels*, 7 Blackf. 108.

We think the instructions, taken together, are substantially right, *Sipe v. Sipe*, 14 Ind. 77; *Haskett v. Small*, 16 Ind. 81; and we think the evidence fully justified the verdict, *Blake v. Hedges*, 14 Ind. 566; *White v. Jackson*, 15 Ind. 156; and that the judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered by the court, upon the foregoing opinion, that the judgment below be, and is hereby, affirmed, at the costs of the appellant.

Rominger v. Keyes et al.

No. 7222.

ROMINGER v. KEYES ET AL.

PROMISSORY NOTE.—*When Governed by Law Merchant.—Statute Construed.*—Under section 6, 1 R. S. 1876, p. 636, no other notes but those payable in a bank in this State are put upon the footing of bills of exchange, and governed by the law merchant; and a note “payable at the Indiana Banking Company, of Indianapolis, Indiana,” is not payable in or at a bank, or the office, banking house, or place of business of a bank, and is not within the terms of the statute, and is not governed by the law merchant.

SAME.—*Estoppel.*—If the contract of the makers of such note had been with such company, they would be estopped to deny its existence at the time of the contract.

From the Bartholomew Circuit Court.

F. T. Hord, for appellant.

W. W. Herod and *F. Winter*, for appellees.

WORDEN, J.—Complaint by the appellees as the *bona fide* holders, for value, by endorsement before maturity, against the appellant and Henry F. Rominger as makers, of the following promissory note :

“HOPE, IND., March 20th, 1877.

“Four months after date we promise to pay James B. Drake, or order, four hundred dollars, and five per cent. thereon for attorney fees, value received, without any relief whatever from valuation or appraisement laws, negotiable and payable at the Indiana Banking Company of Indianapolis, Indiana, with ten per cent. interest until paid.

“HENRY F. ROMINGER,

“MARY E. ROMINGER.”

A verdict was rendered in favor of Henry F. Rominger on his answer of infancy.

Issues were joined between the plaintiffs and Mary E. Rominger, which were found for the plaintiffs, and judgment was rendered against her in favor of the plaintiffs.

The case was tried on the theory that the note was gov-

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erned by the law merchant. The appellant answered, among other things, as follows :

“2. The defendant for answer herein says that the note in suit is wholly without consideration, and the Indiana Banking Company is not a corporation organized under or pursuant to any law of the State of Indiana, nor of any State of the United States, or of any act of Congress, or under any law whatever.”

A demurrer to this paragraph of answer, for want of sufficient facts, was sustained, and this ruling is assigned, among other things, for error.

It is apparent that, if the note is not governed by the law merchant, so much of the above paragraph of answer as alleges that the note was without consideration, was a good defence thereto in the hands of any endorsee thereof. None but notes payable in a bank in this State are put upon the footing of bills of exchange, and governed by the law merchant. The statute provides that “Notes payable to order or bearer in a bank in this State, shall be negotiable as inland bills of exchange, and the payees and endorsees thereof may recover as in case of such bills.” 1 R. S. 1876, p. 636, sec. 6.

The note in this case is payable “at the Indiana Banking Company, of Indianapolis, Indiana.” It is not payable at the office of the company, or the banking house of the company ; nor is any *place* of payment designated in it. The makers of the note may be estopped thereby to deny the existence of such a company as that mentioned. If their contract had been with the company, they would be estopped to deny its existence at the time of the contract. But, conceding for the purposes of the case, that the makers are estopped to deny the existence of the company, the estoppel extends no further. There may have been such a company in existence, without an office or banking house, and the

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makers of the note, as we have seen, did not agree to pay at the office or banking house of the company.

One of the definitions of the word "bank" is "the house or place where such business is carried on." Burrill.

"In commercial law, a place for the deposit of money." Bouvier.

"Commercially, it is a place where money is deposited, for the purpose of being let out at interest, returned by exchange, disposed of to profit, or to be drawn out again as the owner shall call for it." Wharton.

"An establishment for the custody of money ; or for the loaning and investing of money ; or for the issue, exchange, and circulation of money ; or for more than one or all of these purposes. The term is applied to the incorporation or association authorized to perform such functions ; to the body of directors, or other officers authorized to manage its operations ; and to the office or place where its business is conducted." Abbott.

The words "in a bank," as used in the statute above quoted, embody the idea of place as fully as any of the foregoing definitions. The purpose of the statute was, among other things, to have the place of payment specified, so that demands of payment there made, and proper notice of non-payment, would be sufficient to charge the endorser.

As the note in suit, by its terms, is not payable in or at a bank, or the office, banking-house or place of business of a bank, it does not come within the terms of the statute, and is not governed by the law merchant. While we recognize to the fullest extent the rights of parties to commercial paper, we see neither wisdom nor legal propriety in drawing within the vortex of the law merchant paper which, by its terms, does not belong to the class governed by that law.

The court below erred in sustaining the demurrer to the second paragraph of the appellants' answer.

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The judgment below against the appellant is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

73 378
125 501
137 804

No. 7609.

CARR v. HUETTE ET AL.

DECEDENTS' ESTATES.—Property Fraudulently Conveyed.—Right of Creditor to sue Heirs without Administration of Estate.—A creditor may, in a suit to collect his debt, have a conveyance of property fraudulently conveyed by his debtor set aside, and the property subjected to the payment of his claim, without regard to the claims of other creditors. But where the original debtor is deceased, and no administration has been had upon his estate, a single creditor, suing for himself alone, can not maintain an action against the heirs, on a promise of the deceased, and to have property fraudulently conveyed subjected to the payment of his claim, but he must proceed through an executor or administrator for the collection of his debt.

From the Knox Circuit Court.

W. F. Pidgeon, for appellant.

T. R. Cobb, *O. H. Cobb* and *E. W. Cooper*, for appellees.

BICKNELL, C.—This was an action against the widow and infant children and heirs at law of Thomas Carr, upon an account for goods sold and delivered to the decedent by the firm of Huette & O'Hara. O'Hara had assigned to the plaintiff Huette, his co-partner, all his interest in the account, and he was made a co-defendant to answer as to his interest. The complaint avers that when said debt was incurred the said Thomas Carr owned certain real estate in the city of Vincennes, and that he and his wife, on the 29th day of December, 1873, with intent to hinder, delay and defraud the said Huette & O'Hara, conveyed said real estate by deed

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to their daughter, the defendant, Margaret Ellen Carr, who accepted said deed, well knowing the said fraudulent intent of her said parents, and well knowing the existence of said account, and intending to assist her said parents in cheating, hindering, delaying and defrauding said Huetten & O'Hara; that said deed was without any consideration; that said Thomas Carr died before the commencement of the suit, and that at the time of the execution of said deed, and ever afterwards up to the time of his death, he was insolvent and had not enough property to pay all his debts; that, with the exception of said real estate, his estate is now insolvent; that there is no property of said deceased out of which said account can be made, except said real estate, and that no administrator has been appointed. The complaint prays that a guardian *ad litem* may be appointed for the infants; that the plaintiff may have judgment for \$400 and costs; and that said deed may be set aside as null and void, and that said real estate may be subjected to sale for payment of such judgment, and for all other proper relief.

The plaintiff afterward dismissed his action as to all the defendants except Margaret Ellen Carr and John O'Hara. O'Hara answered, admitting the facts alleged in the complaint. The defendant Margaret Ellen Carr, by her guardian *ad litem*, filed an answer in denial. The issues joined were tried by the court, who made a special finding as follows: That on September 5th, 1873, said Thomas Carr was indebted to Huetten & O'Hara, as charged in the complaint, and that said indebtedness is still unpaid; that on December 29th, 1873, and at the time said indebtedness accrued, said Thomas Carr owned the real estate described in the complaint, and that on the day last named he and his wife conveyed the same by deed to their daughter, the said Margaret Ellen Carr, who was then two years and eight months old; that said conveyance was without consideration and was a gift, with intent thereby to hinder, delay and defraud the

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creditors of said Thomas Carr in the collection of their debts; that after executing said conveyance said Thomas Carr had not property enough to pay his debts; that on January 1st, 1875, said O'Hara assigned all his right and interest in said indebtedness to the plaintiff Huette; that on January 25th, 1875, said Thomas Carr died intestate, and that no administration has been granted on his estate; that there is due the plaintiff for principal and interest three hundred and sixty dollars; that said conveyance is fraudulent and void as against the plaintiff, and said real estate ought to be subjected to sale to pay said debt and the costs of suit.

The defendant Margaret Ellen Carr, by her guardian *ad litem*, moved in arrest of judgment. The motion was overruled and judgment was rendered that the plaintiff recover of the said Margaret Ellen Carr the said sum of three hundred and sixty dollars, with six per cent. interest and costs, to be levied only of the said real estate, and that said deed of conveyance be declared fraudulent and void as against the plaintiff, and that said real estate, or so much as is necessary, be sold to satisfy said judgment, without regard to valuation or appraisement laws, and applied, first, to the payment of said costs; second, to the payment of the plaintiff's said debt and interest, and that the surplus be paid to said Margaret Ellen Carr.

From this judgment said Margaret Ellen Carr appealed. The error assigned and argued in the brief of the appellant is that the complaint does not state facts sufficient to constitute a cause of action.

It was formerly a general rule, that, to reach the equitable interest of a debtor in real estate by a suit in chancery, the creditors should first obtain a judgment, and that, to reach personal property, both a judgment and an execution must be shown. *O'Brien v. Coulter*, 2 Blackf. 421. But, since the adoption of the code, it has been held that a creditor, in the same suit against his debtor, may obtain a judgment for

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his debt, and have that judgment enforced against property fraudulently conveyed by the debtor with intent to hinder and delay creditors. *Alford v. Baker*, 53 Ind. 279.

In such an action against the debtor, the creditor may have the property sold to pay his own debt without regard to the claims of other creditors. *Bank, etc., v. Burke*, 4 Blackf. 141; *Barton v. Bryant*, 2 Ind. 189; *McNaughtin v. Lamb*, 2 Ind. 642. But a single creditor, or a few creditors, of a deceased debtor, can not, by suit in chancery, have the property of his estate sold for the payment of their own demands, without any inquiry as to the rights of other creditors. *Butler v. Jaffray*, 12 Ind. 504. And where there has been no administration, a single creditor, suing for himself alone, can not maintain an action against the widow and heirs on a promise of the deceased. *The North-Western Conference, etc., v. Myers*, 36 Ind. 375. So, in the case of *Wilson v. Davis*, 37 Ind. 141, it was held that a creditor of a decedent's estate must proceed to enforce his claim against the estate through an executor or administrator, and can not sue the heirs, devisees and legatees, where there has been no administration. Also, *Leonard v. Blair*, 59 Ind. 510.

Under the foregoing authorities, the plaintiff Huette, could not have maintained a suit against the widow and heirs, or any of them, for the sole purpose of obtaining a judgment against them upon the promise of the deceased.

It is provided by the practice act, sec. 72, that "When the action arises out of contract, the plaintiff may join such other matters in his complaint as may be necessary for a complete remedy, and a speedy satisfaction of his judgment, although such other matters fall within some other one or more of the foregoing classes."

By virtue of this provision, the plaintiff joined to his principal cause of action, which was upon the promise of the deceased, the collateral matter of the fraudulent conveyance, as necessary for a speedy satisfaction of his judgment.

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But if the principal cause of action, which belongs to the first class, could not be maintained alone, it can not be made good by joining with it another cause of action which belongs to the sixth class. See the practice act, secs. 70, 71 and 72, and see *Love v. Mikals*, 11 Ind. 227, where it is held that an administrator, as representative of the creditors of the estate, may maintain a suit to set aside a fraudulent conveyance of real estate by the decedent in his lifetime, whether the claims of the creditors are in judgment or not.

The motion in arrest of judgment ought to have been sustained.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and is hereby in all things reversed, at the costs of the appellee. This cause is remanded, with instructions to the court below to sustain the motion in arrest of judgment.

73	382
141	595
73	382
146	635

No. 7552.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY v. NICKLESS.

PRACTICE.—*Supreme Court.*—*Assignment of Error.*—*Waiver.*—A failure to discuss an assignment of error is a waiver thereof.

PLEADING. — *Common Carriers.* — *Answer.* — *Demurrer.*—In an action against a railway company for injury to stock shipped on the company's cars, the company answered as follows: "That the plaintiff received the stock from the defendant in good condition, and paid the freight thereon, and gave defendant no notice that said stock was not delivered to him in good order, and made no demand for any damages on account of any injuries, or supposed injuries, to said stock."

Held, on demurrer, that the answer was not good in confession and avoidance, and at best could be deemed only an argumentative denial.

SAME.—It is not error to wrongfully sustain a demurrer to a paragraph of an answer, if the facts averred could have been proved under another paragraph.

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PRACTICE.—Supreme Court.—Bill of Exceptions.—Unless the bill of exceptions states that it contains all the evidence given on the trial, the Supreme Court will not consider the question of the sufficiency of the evidence to sustain the verdict.

SAME.—Instructions.—If the instructions given were correct under any supposable state of the evidence, under the issues, the evidence not being in the record, the case will not be reversed.

From the Lawrence Circuit Court.

C. A. Beecher and *E. C. Devore*, for appellant.

N. Crooke, *G. Putnam* and *G. W. Friedley*, for appellee.

BEST, C.—The appellee brought this suit against the appellant, alleging in his complaint, in substance, that the appellant, during the year 1876, owned and operated a railroad, extending from the city of Cincinnati, in the State of Ohio, to the city of St. Louis, in the State of Missouri, and passing through the counties of Jackson and Lawrence in the State of Indiana; that during said time the appellant was a common carrier, engaged in transporting persons and property from point to point on the line of its road; that on the 23d day of October of said year the appellee delivered to it, at Mitchell, a station upon the line of its road in Indiana, one and one-half car-loads of cattle, to be by it transported to Cincinnati, which cattle were properly loaded upon one of its cars, and were, on said day, started for their destination; that appellant, by its servants and employees, so negligently and carelessly ran the train of cars upon which appellee's cattle were loaded, that said train collided with another train standing upon its track, and, by reason thereof, his cattle were thrown violently against each other, were jammed together, and were so severely bruised and injured that when they reached Cincinnati, Ohio, they could only be sold as second and third-class cattle, bringing \$392 less than they would have brought had they not been thus injured; all of which occurred without the fault of the appellee.

The appellant filed its demurrer to the complaint, because

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it did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and it excepted. It then filed an answer in three paragraphs :

The first was a general denial.

The second was as follows : “That said plaintiff received said cattle at Cincinnati, Ohio, from defendant, in good order and condition, and paid the freight thereon, and gave defendant no notice that said stock was not delivered to him in good order, and made no demand for any damages on account of any injuries, or supposed injuries, to said stock.”

The third was in abatement, and it averred that appellant was, at the commencement of the suit, and ever since had been, in the hands of a receiver, by order of the United States Circuit Court for the District of Indiana, and could not pay any debt, or adjust any claim, without violating the orders of said court.

The appellee demurred to the second and third paragraphs of the answer, on the ground that neither of them stated facts sufficient to constitute a defence to the action. This demurrer was sustained, and the appellant reserved an exception. The cause was submitted to a jury, and a verdict returned for the appellee. The appellant moved the court for a new trial, which was overruled, and it excepted. Final judgment upon the verdict.

In this court the appellant has assigned the following alleged errors :

1st. The court erred in overruling its demurrer to the complaint ;

2d. The court erred in sustaining appellee's demurrer to the second and third paragraphs of its answer ; and,

3d. The court erred in overruling its motion for a new trial.

The appellant has failed to discuss any question arising upon the first assignment of error, and any upon the second

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assignment touching the action of the court in sustaining a demurrer to the third paragraph of the answer.

A failure to discuss any assignment of error is, under the well settled practice of this court, a waiver of such assignment, and, therefore, these alleged errors are deemed waived. *Tracewell v. Peacock*, 55 Ind. 572; *Watson v. Piel*, 58 Ind. 566; *Leonard v. Barnett*, 70 Ind. 367.

By the second assignment, the appellant insists that the court erred in sustaining the demurrer to the second paragraph of its answer. In this paragraph but two facts are averred: one, that the appellee received his cattle at Cincinnati in good order; and the other, that he did not claim that they had been injured. If the cattle were injured, as appellee averred, we know of no rule of law, in the absence of a reasonable regulation upon such subject by the appellant, that would cause the appellee to lose his claim for damages, unless he gave notice of such claim when he received his cattle. If, when he received them, he did not claim they were injured, this circumstance would probably tend to show that they were not, in fact, injured; but it could not possibly constitute a defence to the action. The other fact is, that he received them in good order. His acceptance of them did not waive his right to claim damages if they had been injured. If only damaged, as he alleged, he was compelled to receive them. *The Michigan, etc., R. R. Co. v. Bivens*, 13 Ind. 263.

Does the averment that they were in good order and condition constitute a defence? It does not, unless we conclude that, because they were in good order and condition when they were received in Cincinnati, they were not injured on the way. This does not follow. At most, it seems to us, it is but a circumstance tending to show that the cattle were not injured, as averred. If they were in good order and condition when they were received in Cincinnati, it

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would be presumptive evidence that they were not injured on the way, but it would not conclusively follow from that fact that they were not; and, if they were injured on the way, a cause of action at once accrued to the appellee, which could not be avoided by averring that they were in good order and condition when received. This answer is not good in confession and avoidance. If it subserves any purpose, it is in denial of the complaint. It, at most, but avers a fact which tends to show that the appellee's cattle were not injured; and, if such is the proper construction, then it is but an argumentative general denial. It denies that the cattle were injured, by averring that they were in good order and condition. In other words, it denies the appellee's proposition by affirming the contrary to be true. *Hand v. Taylor*, 4 Ind. 409; *Thompson v. Mills*, 39 Ind. 528.

Whether such answer is to be regarded as an argumentative general denial, or a special plea, averring a fact which tends to show that the appellee's injury was not so great as averred, it is clear that there was no error in sustaining a demurrer to it. A general denial was filed, and all the facts averred in this answer could have been proved under that. "It is the settled rule of this court, that a judgment will not be reversed because a demurrer was wrongfully sustained to a paragraph of answer which contained a good defence, if there was another paragraph under which the same facts could have been proved." *Lingenfelter v. Simon*, 49 Ind. 82; *Emmons v. Meeker*, 55 Ind. 321; *Martin v. Merritt*, 57 Ind. 34.

This brings us to the third assignment of error, by which the appellant insists that the court erred in overruling its motion for a new trial. The causes alleged therefor are:

- 1st. The verdict is not sustained by sufficient evidence;
- 2d. The verdict is contrary to law;
- 3d. The damages are excessive;
- 4th. The jury erred in assessing the amount of damages;

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5th. The court erred in giving instruction No. 1 ; and,

6th. The court erred in giving instruction No. 5.

To properly present nearly all the questions that arise upon this ruling, it is necessary that the record should contain the evidence. The only bill of exceptions in the record recites that the appellee, to sustain the issues on his part, called Allen Nickless, who testified as follows: Then follows what purports to be the testimony of said witness and two others, on the part of the appellee, and the testimony of one witness and the deposition of another, on the part of the appellant, at the conclusion of which the bill is dated and signed by the judge, without any other statement in it whatever. This is not sufficient to show that the evidence is in the record. It has been repeatedly held by this court, that the bill of exceptions must contain the statement that it contains all the evidence given on the trial of the cause, and, if it does not, the judgment will not be reversed on the evidence. *Buskirk's Practice*, p. 149, and cases cited; *The Gazette Printing Co. v. Morss*, 60 Ind. 153; *Sessengut v. Posey*, 67 Ind. 408. The evidence not being in the record, the first, second, third and fourth reasons for a new trial present no question. *Marley v. Noblett*, 42 Ind. 85. Neither do the fifth and sixth, unless the instructions are erroneous under any supposable state of the evidence that could have been adduced under the issues. It is well settled in this State that, if the instructions could have been correct, under any supposable state of the evidence, under the issues, the evidence not being in the record, it will be presumed that such state did exist. *Miller v. Voss*, 40 Ind. 307.

As the evidence is not in the record, we can not say that either of these charges was wrong as applied to the case made by the evidence. The only objection made to the first is that the court instructed the jury that the appellee might prove the contract declared upon by showing that he made it by an agent. In this it is mistaken; and, if it were not,

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the charge is not erroneous. The law does not require a party declaring upon a contract resting in parol, made for him by an agent, to aver that it was made by an agent, but he may aver generally that it was made by him, and prove the averment by showing that he made it through an agent. The only fault found with the fifth instruction is in the language of the appellant, that "said instruction was too broad, vague and indefinite, and calculated to mislead the jury." This does not enlighten us. Neither from this statement nor from the instruction itself can we see that it was not strictly applicable to such case as may have been made by the evidence.

We find no error in the record.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and is hereby, in all things affirmed, at the costs of the appellant.

 No. 7156.

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136	179

MORTGAGE.—*Sale of Mortgaged Premises Under Execution.*—*Redemption.* *Effect of.*—*Lien.*—*Foreclosure.*—*Parties.*—*Injunction.*—A. executed a mortgage on real estate to B., which was duly recorded. Subsequently a judgment was rendered against A., on which an execution was issued, and such real estate sold thereunder, and after the year for redemption had expired, a sheriff's deed therefor was executed to C., the assignee of the certificate of sale. Afterward B. foreclosed his mortgage, C. being made a party to the action, and under the decree the real estate was sold, B. becoming the purchaser for a nominal sum. Before the year for redemption expired, C. redeemed said real estate by paying into the clerk's office the amount, with interest, for which it was sold. Shortly thereafter B. sued out another order of sale on his judgment. Suit by C. to enjoin a sale thereunder. *Held*, that such suit would not lie.

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Held, also, that, under the sheriff's deed, C. acquired only the title and interest which A. had in the real estate at the time of the rendition of the judgment, and therefore subject to the lien of B.'s mortgage.

Held, also, that the redemption by C. from the sale to B. did not free such real estate from the lien of B.'s mortgage for the unpaid balance of the mortgage debt.

Held, also, that C. was a proper party to the suit for foreclosure.

Held, also, that in such a case the mortgaged property remains a security for the unpaid balance of the mortgage debt, the collection of which the creditor may enforce by causing a resale by the sheriff of the mortgaged premises under an *alias* order of sale on his judgment of foreclosure, as often as there is a redemption from the sale thereof, and until the mortgage debt has been satisfied.

From the Wayne Superior Court.

B. F. Harris and *T. J. Study*, for appellants.

J. L. Rupe, for appellee.

Howe, C. J.—This was a suit by the appellee against the appellants to enjoin the sale by the appellant Smith, as the sheriff of Wayne county, of certain real estate, particularly described, in said county. After the cause had been put at issue, it was submitted to the court for trial, upon an agreed statement of facts; upon which a finding was made for the appellee, and judgment was rendered thereon, perpetually enjoining the appellants, and each of them, in accordance with the prayer of the appellee's complaint. The appellants' motion for a new trial having been overruled, and their exception saved to this ruling, they appealed from the judgment rendered to this court, and, by proper assignments of errors here, have called in question the several decisions of the trial court adverse to them, upon which they ask for the reversal of the judgment.

It would seem, from the record of this cause, that, after the issues had been joined therein, the parties had submitted "the matter of controversy between them" to the court below, upon an agreed statement of facts, made out and signed by them; and that, by an affidavit then filed, it was shown to the court "that the controversy is real, and the proceedings

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in good faith to determine the rights of the parties," in conformity with the provisions of section 386 of the code, 2 R. S. 1876, p. 190. Upon this agreed statement of facts the court decided in favor of the appellee; to which decision of the court the appellants at the time excepted. On the overruling of their motion for a new trial, the appellants excepted to that decision, and filed their bill of exceptions, in which the agreed statement of facts was set out at length, as "all the evidence given in the cause." So that the case comes before this court for decision, both as "an agreed case" and an ordinary appeal.

As necessary to the proper presentation of the question for our decision in this case, and to a clear understanding of the point decided, we will first give a summary of the "agreed statement of facts," as follows:

It was agreed, that on the 20th day of January, 1874, Joseph Comer was the owner in fee simple of the real estate described in the complaint, and that, on that day, the said Joseph and Nancy Comer, his wife, executed a mortgage conveying the said real estate to the appellant Benjamin Harris, to secure the payment of a promissory note for \$563, dated January 19th, 1874, executed by said Joseph Comer and payable one year after date to said Benjamin Harris, which said mortgage was duly recorded in the recorder's office of said Wayne county, on the 7th day of February, 1874; that on March 17th, 1875, in the Wayne Circuit Court, Lydia and Joseph B. Bennett recovered a judgment against the said Joseph Comer and another for the sum of \$667.35, which judgment became a lien on said real estate, from the date of its rendition; that, by virtue of an execution issued on said judgment, the sheriff of Wayne county levied upon, advertised and sold, according to law, the said real estate to the said Lydia Bennett for the sum of one dollar, that being the highest and best bid made therefor, and the said sum of one dollar having been paid, the said sheriff executed to said

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Lydia Bennett a certificate of such sale, which said certificate the said Lydia assigned in writing and transferred to the appellee, Clarkson T. Moore; that the said real estate not having been redeemed from such sale, the said sheriff afterward, on the 2d day of October, 1876, executed to the appellee, Moore, as the assignee and holder of said certificate of sale, a sheriff's deed of said real estate; and that the appellee claimed to own and hold said real estate in fee simple, solely by virtue of the said sheriff's sale thereof, the assignment to him by said Lydia Bennett of said certificate of sale, and the said sheriff's deed to him of said real estate.

It was further agreed that, on March 18th, 1877, the appellant Benjamin Harris commenced an action in the Wayne Superior Court, against the said Joseph and Nancy Comer, and the appellee, Moore, on his said note and mortgage, in which action the appellee, Moore, was made a defendant, for the reason that he then claimed to own said real estate in fee simple, by virtue of said sheriff's deed thereof to him, and it was alleged in the complaint therein that said Moore held said sheriff's deed for said real estate; that such proceedings were had in said action as that, on the 19th day of June, 1877, in said Wayne Superior Court, the appellant Harris recovered a personal judgment against the said Joseph Comer, on his said note, for the sum of \$814.35, and a judgment against the said Joseph and Nancy Comer, and the appellee, Moore, for the foreclosure of said mortgage and the sale of the mortgaged real estate to satisfy said judgment of \$814.35; that, on the 9th day of July, 1877, an order of sale, duly certified, was issued on said judgment, to the sheriff of Wayne county, and by virtue thereof, after having advertised the time and place of sale, according to law, the said sheriff, on the 4th day of August, 1877, offered and sold the said real estate to the appellant Harris for the sum of one dollar, that being the highest and best bid made therefor; that, the said sum of one dollar having

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been paid, the said sheriff executed to said Harris a certificate of said sale, and afterward, on August 6th, 1877, returned said order of sale endorsed, "no other property found in my bailiwick, subject to execution;" that, on August 13th, 1877, the appellee, Moore, for the purpose, and with the intention, of redeeming said real estate from said sheriff's sale thereof to said Benjamin Harris, paid into the clerk's office of said court, for the use of said Harris, one dollar and five cents, being the purchase-money and interest thereon, at the rate of ten per cent. per annum; and the appellee claimed that he had thereby redeemed said real estate from the said sheriff's sale thereof to said Harris; and that, on the 20th day of September, 1877, the appellant Benjamin Harris had sued out of said superior court an *alias* order of sale, duly certified, on his said judgment of foreclosure, etc., directed to the sheriff of Wayne county, who, under the directions of said Harris, would advertise and sell the said real estate to satisfy the said judgment against said Joseph Comer, if he should not be enjoined from so doing, as prayed for in appellee's complaint.

It was further agreed that the said real estate then was, and for two years past had been, worth the sum of \$500, and no more; and that the only right, title or interest which the appellee, Clarkson T. Moore, then or ever had in and to said real estate, was that derived by him under and by virtue of the said sheriff's sale thereof to said Lydia Bennett, and of her assignment to him of her certificate of sale, and of the sheriff's deed to him, as the assignee and holder of such certificate.

Upon the foregoing agreed facts, the appellee claimed, and the court, in effect, decided, that the appellant Benjamin Harris, after the redemption of the real estate from the first sale thereof under his judgment, had no right to have such real estate resold to satisfy the unpaid balance of his judgment; and that the appellee was the owner in fee, and entitled to

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hold and have possession of said real estate, under and by virtue of the said sheriff's deed thereof to him, entirely divested of the lien thereon of the said judgment and decree of foreclosure in favor of the appellant Harris, on his note and mortgage.

We are of the opinion that the court clearly erred in its finding, decision and judgment on the agreed statement of facts in this case. It will be seen from the agreed facts that the mortgage to the appellant Harris, on the real estate described in the complaint was dated January 20th, 1874, and was duly recorded in the proper recorder's office; while the judgment against Joseph Comer, under which the appellee, Moore, acquired "the only right, title or interest" which he "ever had in and to said real estate," was rendered and became a lien on said real estate on March 17th, 1875, or more than one year after the lien of said mortgage attached thereon. When, therefore, an execution was issued on said judgment against the said Joseph Comer, and in favor of the said Lydia and Joseph B. Bennett, and the sheriff of Wayne county, by virtue of said execution, levied upon and sold the said real estate, and, upon the non-redemption thereof, subsequently conveyed the same to the appellee, Moore, as the assignee of the purchaser at such sale, it is certain, we think, that the appellee took such real estate subject to the prior mortgage thereon in favor of the appellant Harris. In other words, under the said sheriff's deed to him, the appellee, Moore, acquired only the title, interest and estate which the said Joseph Comer had in said real estate at the time of the rendition of the Bennetts' judgment, and subject, of course, to the prior lien thereon of the mortgage owned and held by the appellant Benjamin Harris.

In the subsequent suit for the foreclosure of said mortgage, the appellee, Moore, as the owner and holder of the mortgaged premises, under his said sheriff's deed thereof,

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was a proper and necessary party defendant, and was made such accordingly. When the judgment was rendered in said suit against the said Moore and his co-defendants therein, it was adjudged and decreed against all the defendants, Moore included, that the mortgaged premises be sold as other lands were sold on execution, to satisfy the mortgage debt and costs. Of course, any sale of the real estate under this judgment and decree, if subsequently perfected by the execution of a sheriff's deed, upon the non-redemption of the premises from such sale, would have freed and divested the real estate of and from the lien thereon of the mortgage debt, or of any part or portion thereof. But the sale of said real estate to the appellant Benjamin Harris, under said judgment and decree of foreclosure, for the sum of one dollar, was never perfected by the execution of a sheriff's deed to the purchaser or his assignee. On the contrary, as the agreed facts show, the said real estate was redeemed from the said sheriff's sale thereof to the appellant Harris by the appellee, Moore, in the manner and within the time prescribed by law for such redemption.

It is certain, we think, that the appellee, Moore, did not and could not, under and by force of his redemption of said real estate from the sheriff's sale thereof to the appellant Harris, acquire any different or better title thereto than the one previously acquired and held by said appellee, under his deed from the sheriff of said county. Nor did, nor could, the appellee's redemption of said real estate from the sale thereof to the appellant Harris operate under the law to free such real estate from, or to divest it of, the lien of the Harris mortgage thereon, as a security for the unpaid balance of the mortgage debt. In the recent case of *Teal v. Hinchman*, 69 Ind. 379, the precise question presented in this case was carefully considered and decided. In the case cited, it was insisted, as in the case now before us, that, by reason of the sale by the sheriff, the mortgaged property

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under the judgment of foreclosure, "the mortgage and the decree thereon became *functus officio*," and the mortgaged premises would be and were, by force of such sale, discharged from, and divested of, the lien of the mortgage and of the judgment of foreclosure. In considering the point thus made, in the case cited, this court said :

"If the mortgaged property had not been redeemed from the sheriff's sale thereof, under said judgment of foreclosure, in the manner and within the time allowed by the statute, and if, accordingly, by reason of such non-redemption, such sheriff's sale had been fully confirmed and consummated according to law, by the execution and delivery to the purchaser of a proper sheriff's deed of such mortgaged property, then it would seem to us that the mortgaged premises had thereby become divested and entirely freed from the lien of the mortgage and of the judgment of foreclosure. But it was alleged by the appellees, in their complaint, and conceded to be true by the appellants' demurrers," (in the case at bar it was an agreed fact,) "that the mortgaged premises were duly redeemed, according to law, from the said sheriff's sale thereof, before the commencement of this suit. The effect of such redemption was to vacate and set aside the said sheriff's sale of the mortgaged property, and thereafter both the mortgage and the judgment of foreclosure stood precisely as they would have done, so far as the property was concerned, if no sale thereof by the sheriff had ever been made."

We can see no good reason for changing or modifying the views thus expressed in the case cited, and they seem to us to be decisive of the question presented by the agreed statement of facts in this case. In such a case, the mortgaged property will remain a security for the unpaid balance of the mortgage debt and costs, and the judgment creditor may enforce the collection thereof by suing out an *alias* order of sale on his judgment of foreclosure, and by causing a resale

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by the sheriff of the mortgaged premises as often as there may be a redemption of and from the previous sale thereof, in the mode, and within the time, prescribed by law for such redemption, and until the mortgage debt, interest and costs have been fully paid and satisfied.

Upon the case made by the agreed statement of facts, we are of the opinion that the finding, decision and judgment of the trial court, in favor of the appellee and against the appellants, were unauthorized by law and erroneous. No case is made by the record which entitles the appellee to an injunction, or to any other relief, against the appellants, or either of them.

The judgment is reversed, at the appellee's costs, and the cause is remanded with instructions to find for the appellants, the defendants below, upon the agreed statement of facts, and to render judgment accordingly.

No. 7512.

RUCKER v. STEELMAN.

REAL ESTATE.—Action to Recover.—Pleading.—Answer.—Counter-Claim.—Contract.—Redemption.—Statute of Frauds.—Case Distinguished.—In an action for the recovery of real estate, A., the defendant, alleged that in March, 1861, he executed to B. a mortgage thereon, which B. in October, 1873, foreclosed, and at the sheriff's sale became the purchaser, and shortly thereafter took a sheriff's deed therefor. On the 16th day of December, 1871, the real estate was sold on a judgment against A. and the certificate of purchase assigned to B. On the 1st day of December, 1872, A., with B.'s knowledge and consent, made a verbal contract with C., his brother, for the redemption of the real estate, and, in pursuance thereof, C. paid to B. a certain sum for which he assigned the said certificate to C., upon which he afterward obtained a sheriff's deed. In March, 1876, a similar agreement was made between A. and C., with the knowledge and consent of B., to redeem from the

73	396
126	379
126	285

73	396
129	224

73	396
131	126
133	293

73	396
144	174
147	211

73	396
151	87

73	396
164	582

73	396
166	107

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sale made on the decree of foreclosure, and, in pursuance thereof, C. paid B. a certain sum for which he conveyed the property to C.'s son. Afterward C. and his son conveyed the real estate to the plaintiff, "who had sufficient notice and knowledge to put him on inquiry that the conveyances to said C. and son were solely for the use and benefit of the defendant, and were intended to be and were securities only for the repayment of the money advanced by C." The property, at the time of the agreements and the various sales and conveyances, was in the possession of A., who claimed title thereto. Prayer for affirmative relief. *Held*, that such pleading is a counter-claim, and not an answer. It can not be both.

Held, also, that a counter-claim must stand as an independent pleading, and aver facts warranting the relief sought.

Held, also, that, at the time the agreements were made, B. was the owner of the real estate.

Held, also, that the contract upon which the decree of foreclosure was rendered having been made before the redemption law of 1861 was in force, A. had no right to redeem.

✓ *Held*, also that such agreements were parol contracts for the purchase of lands and within the statute of frauds.

Held, also, that the allegation that A. was in possession of the land, claiming title, is not sufficient to take the case out of the statute. In order to have this effect, it must be shown that the possession was taken under the parol contracts. *Tinkler v. Swaynie*, 71 Ind. 562, distinguished.

SAME. — *Mortgage. — Agreement. — Foreclosure. — Decree. — Sheriff. — Presumption.* — In such action, a paragraph of answer alleged, that during the pendency of the suit by B. to foreclose two mortgages, one executed prior to the redemption law of 1861, and the other subsequently, no rate of interest being specified therein, an agreement was made between A. and B. whereby judgment was rendered thereon for a certain sum, including the amount due on both mortgages, the judgment to bear interest at the rate of ten per cent. per annum.

Held, that such agreement did not extinguish, or profess to extinguish, the contract upon which the foreclosure suit was founded, and that such judgment rested upon the mortgages and not upon the agreement.

Held, also, that the Supreme Court will presume, in the absence of any showing to the contrary, that the court entered the proper decree upon the mortgages, and that the sale made by the sheriff was in accordance therewith.

SAME. — *Sheriff's Sale. — Deed. — Redemption.* — Where the right of redemption exists, the execution by the sheriff of a deed to land sold on a decree, before the expiration of the year allowed for redemption, will not invalidate such sale.

SAME. — *Failure to Execute Certificate.* — The failure of the sheriff to exe-

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cute a certificate to the purchaser will not invalidate a sale of real estate made by him.

SAME.—Deed.—Description.—Construction.—It is not the office of a description in a conveyance to identify the land, but to furnish the means of identification; that portion of a deed describing the premises conveyed must be liberally construed.

SAME.—Evidence.—Title under Sheriff's Sale.—In an action for the possession of real estate by a plaintiff claiming title by purchase at a sheriff's sale under a decree of foreclosure, all he is bound to prove is a valid judgment and sale, and the execution of the proper deed; all questions respecting the validity of the mortgage, including the sufficiency of the description, being settled by such decree.

SAME.—Evidence.—Boundaries.—Possession.—In such action, where the defendant is in possession of the real estate, and makes defence, proof of the boundaries of the land is immaterial.

From the Clark Circuit Court.

J. H. Stotsenburg, for appellant.

M. C. Hester and *D. C. Anthony*, for appellee.

ELLIOTT, J.—The appellee's complaint against appellant is for the recovery of the possession of real estate, and is in the ordinary form. The answer of the appellant is in three paragraphs:

The first is a general denial.

The second and third set up affirmative defences by way of counter-claim.

Demurrers were sustained to the second and third paragraphs, and we are required, by the assignment of errors and the brief of counsel, to consider the questions presented by these rulings.

The material allegations of the second paragraph, exhibited in a condensed form, are substantially these: On the 21st day of March, 1861, appellant executed to one John King a mortgage upon the real estate in controversy to secure the payment of \$2,000. On the 10th day of October, 1873, the Clark Circuit Court, in a suit upon said mortgage, rendered a decree of foreclosure. On the 1st day of November of said year, the property was sold by the sheriff to the

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said King for \$2,200, and on the 20th day of that month a deed was executed. Prior to the commencement of the foreclosure suit, on the 12th day of September, 1871, David W. Dailey recovered judgment against appellant for the sum of \$1,360, and on this judgment the real estate in controversy was sold to one Warren Horr for \$200, on the 16th day of December, 1871, who received a sheriff's certificate, which was afterward assigned to said John King. On the 1st day of December, 1872, appellant made a verbal agreement with his brother, George I. Rucker, with King's knowledge and consent, for the redemption of the real estate; that, pursuant to this agreement, George I. Rucker paid King \$275, and the latter assigned to the said George I. Rucker the certificate of sale. The said George I. Rucker obtained a deed from the sheriff on the 26th day of December, 1876. In March, 1876, a similar verbal agreement was made between the two Ruckers, with the knowledge and consent of King, as to the redemption of the property from the sale made upon the decree of foreclosure, and in pursuance of this agreement the said George I. Rucker paid to King the sum of \$2,000, and King thereupon conveyed the property to George W. Rucker, a son of the said George I. Rucker. Afterward George I. and George W. Rucker conveyed the premises to the appellee, who, to quote from the pleading, "had sufficient notice and knowledge to put him on inquiry that the conveyances to the said George I. and George W. Rucker were solely for the use and benefit of the defendant, and were intended to be, and were, securities only for the repayment of the moneys advanced by said George I. Rucker." The property, at the time of making the verbal agreements, and at the time of the various sales and conveyances, was in appellant's possession, who, during all the period covered by these transactions, was claiming title. The prayer is for affirmative relief, the adjustment of accounts between the parties and the quieting of appellant's title.

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The pleading is a counter-claim, and not an answer; it can not be both. If it is not good as a counter-claim, then the demurrer was properly sustained.

One of the questions arises upon the allegation charging appellee with notice of the character of the conveyances made to, and by, George I. and George W. Rucker. Appellee insists that the counter-claim is, in this particular, radically defective, and that the pleading, instead of stating facts, has stated a mere conclusion of law. We think the allegation sufficient to withstand attack by demurrer. Whether it would be sufficient upon a motion to make more specific, is another question.

The controlling question is as to the validity of the verbal agreements, upon which the appellant relies. He paid no money to King, nor did he pay any to the appellee's grantor; all the money which was paid was advanced by the latter out of his own means. It can not, therefore, be held that the present case is within the rule applying to cases where purchase-money is paid by one, and title taken in the name of another. Nor can the case be brought within the rule, that the statute of frauds can not be used to perpetrate a fraud. No fraudulent representations were made by the appellee, nor was any undue advantage taken of the appellant. At the time the verbal agreements are alleged to have been made, King was the owner of the real estate, the absolute title was vested in him by the sale made upon the decree of foreclosure. The contract upon which that decree was rendered was made before the redemption law of 1861 went into force, and there was, therefore, no right to redeem. *Scobey v. Gibson*, 17 Ind. 572. No right was taken from the appellant, because he had none. King held the title, free from all equities, and the acquisition of title by George I. Rucker was not by way of redemption, but by way of purchase. There was no reason why the appellee's grantor might not purchase an absolute title; nothing, certainly, in

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the relation occupied to the appellant which prevented him from doing so. The element of fraud does not, therefore, enter into the case made by the counter-claim.

The verbal agreements which the appellant's pleading sets forth were in reality for the purchase of lands. When these agreements were made, the appellant had no interest, either legal or equitable, in the land. The sale and conveyance by the sheriff extinguished all the rights of the appellant and vested an absolute title in King. It was this title which was purchased of and conveyed by King. The most favorable construction which can be given the verbal contracts relied upon is, that they, in terms, if not in legal effect, gave to the appellant a right to purchase from George I. Rucker upon payment of the money which he had paid to King. If this is the correct construction of these verbal agreements, then they were clearly within the statute, for they were contracts for the sale of lands.

Treating the facts stated as showing a promise on the part of George I. Rucker to hold the land for the appellant, the counter-claim must still be held bad. An agreement to hold lands until the happening of a designated event, and then to convey, is within the statute. In *Johns v. Norris*, 7 C. E. Green, 102, it was held that an agreement with an execution defendant to purchase property for him, at a sheriff's sale, and to hold for him for a certain time, will not create a trust, and that such an agreement is void by the statute of frauds. In *Merritt v. Brown*, 6 C. E. Green, 401, BEASLEY, C. J., said: "When, therefore, the elements of the case are simply a purchase, under a parol promise to hold for the benefit of the defendant in execution, I think such an arrangement, the statute of frauds being set up, can not be enforced either at law or in equity." The case of *Payne's Adm'r v. Patterson's Adm'rs*, 77 Pa. St. 134, affords a forcible illustration of the doctrine under discussion. There is also a very great similarity between the present case and that of *Loomis*.

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v. *Loomis*, 60 Barb. 22, where a contract remarkably like those relied upon by the appellant was held to be within the statute. We quote from the opinion in that case the following: "The plaintiff, at the time of this agreement, had no title or interest in the property in question, and there was no legal consideration received from him, for the promise made by the defendant, and this is another difficulty thrown in his way by the statute of frauds." But we need not cite cases from other courts, for the purpose of sustaining this general doctrine here stated, for our own court has fully considered and settled the question here involved. *Minot v. Mitchell*, 30 Ind. 228; *Pearson v. East*, 36 Ind. 27; *Blair v. Bass*, 4 Blackf. 539.

The allegation in the counter-claim, that the appellant was in possession claiming title, is not sufficient to take the case out of the statute. In order to have this effect, it must appear that the possession was taken under the parol contract. *Neal v. Neal*, 69 Ind. 419.

Counsel refer us to the case of *Tinkler v. Swaynie*, 71 Ind. 562. That case is essentially different from the present. There, the parties who entered into the contract had a right to redeem the land, which was the subject-matter of the contract, and this fact, of itself, distinguishes the case from the one in hand, for here the appellant had no interest whatever in the land at the time the verbal agreements were made. He surrendered no right, and parted with no interest, in the land, for he had none. But the case cited by appellant does not decide that the parol contract therein relied upon was valid, for the decision is rested upon the ground that there was such part performance as took the case out of the statute. The only way in which the appellant could have acquired the title which the sheriff's sale had vested in King, was by purchase, and, in order to have established a valid contract of purchase, he must have shown either a written contract, or a verbal contract partly performed. There was

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here no part performance; had the entire purchase-money been paid, it would not have been part performance. *Johnston v. Glancy*, 4 Blackf. 94. And, as we have already seen, possession was not taken under the contract.

It is difficult to summarize the allegations of the third paragraph of the counter-claim, and for that reason the material parts are given in full. The substantive parts of said pleading are as follows: "That the plaintiff, Steelman's, title is based on a pretended deed from the sheriff of Clark county, executed to one John King, November 20th, 1873, under whom, as grantee in said deed, the said Steelman claims title through one or more grantees; that said deed is void, because he says that, heretofore, to wit, on March 5th, 1873, the said John King instituted against this defendant a proceeding in foreclosure of two certain mortgages, one recited in his first paragraph of complaint being founded upon a mortgage, executed October 20th, 1869, conveying a piece of land other than that described in the complaint, and the other recited in the second paragraph of his complaint being founded on a mortgage, dated March 21st, 1861, to secure a note of like date, for \$1,781, payable with interest from date, no rate of interest at all being recited therein, the same having been executed before the redemption law of Indiana was enacted; that such proceedings were had in said cause that, on October 10th, 1873, a new contract or agreement was made, in writing, with respect to the said last named indebtedness, as well as the first above recited, wherein it was agreed that judgment should be that day rendered in favor of the plaintiff for \$2,100, on the second paragraph of the complaint, and for the foreclosure of the mortgage described in said paragraph, the said judgment to bear ten per centum interest per annum from date. Thereupon judgment was rendered on said day, by agreement, for the sum of \$3,200, so as to include amounts due on both mortgages. That the land was sold by the sheriff, on the

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15th day of November, 1873, to John King; that no certificate was ever issued to said King, but that, on the contrary, the said King obtained and received from said sheriff a deed of conveyance."

Appellant's theory is that the contract entered into on the 19th day of October, 1873, created a new and distinct cause of action, and that, as the judgment was based thereon, the act of 1861 governed the sheriff's sale and proceedings thereunder, and, therefore, the sheriff's sale was rendered void because no certificate was issued to the purchaser. The effect given by agreement of October, 1873, by appellant, is not warranted by its provisions. It did not extinguish, nor did it profess to extinguish, the contracts upon which the foreclosure suit was founded. These contracts were left in full force, and the judgment rendered rested upon them, and not upon the agreement of October, 1873. The allegation of the pleading is that "the judgment was rendered for the sum of \$3,200, so as to include amounts due on both mortgages." It is clear that the decree and judgment were rendered on the contracts set out in the complaint filed in the foreclosure suit, and that the agreement of October, 1873, was a mere adjustment of the amounts due upon the mortgages declared on.

The presumption is in favor of the acts of public officers, and, in the absence of any showing to the contrary, we are bound to presume that the sheriff did his duty. There is no allegation that the real estate was not sold upon the decree rendered on the mortgage executed in March, 1861. There is nothing at all from which it can be inferred that the sale was upon the entire decree. We are bound to presume that the court entered the proper decree, and that the sheriff properly executed it. Not only is this the presumption of the law, but it is also the fair and natural inference from the facts pleaded. The mere fact that both mortgages were foreclosed by one decree does not prove that the proper direc-

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tions as to the manner of conducting the sale were not embodied in it. It was just as easy to make the proper decree in the suit upon the two mortgages as it would have been if suits had been brought upon each mortgage separately. It affirmatively appears that the mortgages were declared upon in distinct and separate paragraphs, and a decree making the proper provisions as to sale could have been readily entered.

If it were conceded that the sale by the sheriff was governed by the law of 1861, and the appellant entitled to redeem, he would still have no sufficient cause for counter-claim. The judgment was valid, the sale upon it regular, and by that sale the appellee's grantor acquired title. Even upon appellant's own theory, the only thing lacking was the certificate, which was mere evidence of title, not the substantive thing which created title. The deed which the sheriff executed to King was, according to appellant's argument, prematurely issued. Grant that this were true, yet the appellant shows no legal or equitable title to the land in controversy, for the year allowed for redemption had expired long before this action was brought. All the right which the sale left in the appellant, even upon his own theory, was the right to redeem within one year, and with the expiration of the year that right terminated. If, then, we accept his theory as correct, and concede that he had a right to redeem within one year, we are still bound to conclude that his pleading is not good as a counter-claim, for certainly he is not entitled to defeat the appellee's sale. If we regard the pleading as an answer merely, then no harm was done in sustaining the demurrer, even conceding it to be sufficient, for the matters therein pleaded were clearly admissible under the general denial, but it is very certain that the pleading is a counter-claim, and not an answer. As it is a counter-claim, it must stand as a distinct and independent pleading.

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and properly aver such facts as warrant the granting of the affirmative relief sought.

The omission of the sheriff, conceding it to be such, to execute a certificate to the purchaser, did not invalidate the sale. *Barnes v. Kerlinger*, 7 Minn. 82. As the sale was valid, the year of redemption dated from the day of the sale, and had, therefore, expired long before this action was instituted. The right to redeem is purely a statutory one, and must be asserted in strict conformity to the statute. The right must be exercised within the time and in the manner prescribed, or it is lost. *Rorer Judicial Sales*, 433.

The questions presented upon the ruling refusing a new trial are, in the main, much the same as those disposed of in considering the rulings upon the pleadings.

The decree, return of sheriff thereon, and the deed executed by him, show that the mortgages foreclosed at the suit of John King were provided for by separate orders; that the lands described were sold separately, and that, for the land embraced in the mortgage executed in March, 1861, the sheriff delivered to the purchaser a deed, and, for the land embraced in the subsequent mortgage, executed a certificate. This was right. From the sale made upon the contract executed in March, 1861, the appellant had no right to redeem; and the appellee was, therefore, entitled to a deed.

As one of the grounds for a new trial, the appellant assigns and argues that the description of the land in controversy, both in the mortgage and sheriff's deed, is insufficient. The description is as follows, to wit: "The following real estate in Clark county, Indiana: Part of surveys Nos. 56 and 75 of the Illinois grant, beginning at the Ohio river, at the southern corner of said surveys, and running thence with the original line dividing said surveys, to the top of the cliff; thence in a direct line in a westerly direction, to David W. Dailey's line; thence in the same direction, to the corner of land formerly owned by W. Henning; thence with said Hen-

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ning's line, to the river ; thence up said river, to the beginning, including the ferry, known as McDaniel's ferry, across the Ohio river."

The objection urged is that part of the land is in survey 41, and that the description should, therefore, have been parts of surveys 56, 41 and 75. The objection can not prevail. Courses and distances are carefully given, and visible monuments, marking lines and corners, are described, and there can be no difficulty at all in locating and identifying the land conveyed by the mortgage and the deed. It is a familiar rule, that the part of the deed describing the premises conveyed shall be construed with the utmost liberality. It is not the office of a description to identify the land, but to furnish the means of identification. *Colcord v. Alexander*, 67 Ill. 581 ; *Pursley v. Hayes*, 22 Iowa, 11 ; *The German, etc., Ins. Co. v. Grim*, 32 Ind. 249 ; *Peck v. Mallams*, 10 N. Y. 509 ; *Mecklem v. Blake*, 19 Wis. 419 ; *Slater v. Breese*, 36 Mich. 77. Looking to the face of the conveyance, there is clearly a sufficient description. Parol evidence was introduced by both parties upon the question as to whether any part of the lands were in survey 41, and upon this point there was some conflict, and, under the well settled rule, we must allow the finding of the trial court to remain undisturbed. The description certainly did not make the deed or mortgage void for uncertainty, and the attempt to show that the deed conveyed other land than that in controversy was not successful, even if it had been proper. The defence by appellant was, under the 597th section of the code, a confession that he was in possession of the property described in the complaint. Evidence of the boundaries of the land was, therefore, irrelevant. In *Voltz v. Newbert*, 17 Ind. 187, it was said : "Proof of possession in the defendant being unnecessary, the boundaries of the land described by the plaintiffs, are, in effect, conceded, and evidence tending to prove their location must of course be deemed immaterial."

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Applegate v. Doe, 2 Ind. 169 ; *Doe v. Hall*, 2 Ind. 24 ; *Doe v. Hildreth*, 2 Ind. 274. The inquiry, therefore, must be restricted to the question whether the description in the sheriff's deed was sufficiently certain to convey title. If it was, then the appellee was entitled to a verdict and judgment. All that the appellee was bound to prove was a valid judgment, a sale, and the execution of the proper deed. *Splahn v. Gillespie*, 48 Ind. 397. All questions respecting the validity of the mortgage were conclusively settled by the decree, and among them, of course, the sufficiency of the description of the property.

Judgment affirmed.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—Appellant claims, in his petition for a rehearing, that we did not give due weight to the allegation of his cross complaint, that he had paid part of the purchase-money for the real estate sought to be recovered. Appellant seems to have forgotten that, when this alleged payment was made, the title of the purchaser at the sheriff's sale had become an absolute and perfect one, and he seems also to have lost sight of the familiar rule, that payment of all the purchase-money will not take a case out of the statute of frauds. Payment might have given a right of action to recover back the money against the person to whom the money was paid, but certainly not against his grantee.

It is insisted that the agreement made during the pendency of the foreclosure suits gave the appellee's grantors only an equitable title, and that, as they have founded their action on a legal title, they must fail. The agreement named did not, in any wise, affect the lien of the mortgages, nor the rights of the parties thereunder, and a sale upon the decree conveyed a perfect legal title.

Petition overruled.

 Everhart *et al.* v. Puckett.

No. 7659.

EVERHART ET AL. v. PUCKETT.

73	409
141	58
73	409
157	658

PROMISSORY NOTE.—Consideration.—Written and Parol Evidence.—The consideration of a note may always be shown, either by written or parol evidence, and the fact that a part of the evidence has been reduced to writing, will not exclude the oral part thereof.

SAME.—Agreement not to Defend Divorce Suit Void.—Public Policy.—An agreement, that a defendant in a divorce suit will not make any defence, is void as against public policy, and a note executed upon such a consideration can not be enforced against the maker.

SAME.—Blending of Void and Valid Consideration.—Where the illegal and void part of the consideration of a note is so indefinite and uncertain that it can not be separated from the legal part, the whole note is rendered void.

From the Sullivan Circuit Court.

G. W. Buff and *J. B. Patten*, for appellants.

J. C. Briggs and *W. A. Massie*, for appellee.

FRANKLIN, C.—Puckett sued Everhart & Everhart, on a promissory note, before a justice of the peace; judgment was rendered for the plaintiff; appeal to the circuit court; trial by the court, and judgment for the plaintiff for the amount of the note and interest; motion for a new trial, by defendants, overruled and excepted to.

In this court appellants have assigned, as error, the overruling of the motion for a new trial. The motion for a new trial was for the following causes:

“1st. That the decision of the court is not sustained by sufficient evidence;

“2d. That the decision of the court is contrary to law; and,

“3d. That the court erred in admitting in evidence, over the defendants’ objection, the evidence of Lewis Puckett, the plaintiff, and of one O. P. Willey, which evidence consisted of statements by them made to the court during the trial, that the dismissal of the suit for one hundred and ninety-five dollars, pending against the defendant Alexander Everhart, before Milton Stark, as justice of the peace, and the

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receipting of a judgment against said Alexander for sixteen dollars, was the only consideration for which the note sued on in this cause was given, when said consideration was fully set forth in a written contract, executed by the plaintiff and defendant Alexander Everhart, at the same time said note was executed, which said written contract had been duly introduced, and read in evidence, before said witnesses testified in said cause.”

In order to understand the 3d cause set out for a new trial, it is necessary to set forth the written agreement referred to, which reads as follows :

“This agreement, made between Lewis Puckett and Alexander Everhart, shows that Alexander Everhart agrees to give to said Lewis Puckett his note for one hundred dollars, with surety, due the 1st day of May, 1878, upon the following conditions, said note to be placed in the hands of Greenberry Shepherd, to hold in trust for the parties.

“The said Everhart is to commence suit at the next term of the Sullivan Circuit Court, for a divorce, against his wife, Alice Everhart, and prosecute said suit as fast as the law will permit ; and said Puckett agrees that said Alice shall not appear and make any defence in said suit ; and the said Puckett agrees to dismiss a suit pending before Milton Stark, a justice of the peace of Jackson township, in said county and State, against said Everhart, in favor of Stephen Wilson ; and the said Everhart agrees to confess judgment for costs in said suit ; and the said Puckett agrees to receipt a judgment for sixteen dollars, on the docket of said Stark, in favor of said Stephen Wilson, and against said Everhart ; and the said Puckett agrees that said Alice shall not bother said Everhart any more ; and the said Everhart is not to commence any suit against said Stephen Wilson ; and the said Puckett shall not demand said note of said Shepherd until said Everhart violates this contract ; and said note is to be paid two days after said divorce is granted ; and it is agreed

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that said Puckett shall not be entitled to said note until this agreement is violated by said Everhart; and, if any charge is made that said Puckett has violated this agreement, said Puckett is to have notice of said charge, and shall have a reasonable time to meet said charge.

“Witness our hands and seals, this 15th day of February, 1878.

LEWIS PUCKETT,

ALEXANDER EVERHART.”

Counsel for appellants insist in their brief that this agreement unalterably fixes the consideration of the note, and that parol evidence could not be given upon that subject, and therefore the evidence of Puckett and Willey was illegally admitted. The consideration of a note is at all times subject to proof, either by written or parol testimony, or by both. And, if a part of the testimony has been reduced to writing, that is no reason for excluding the oral testimony. We see no error in the admission of the testimony of Puckett and Willey.

In this agreement, as is shown by the testimony, Puckett acted as trustee for Alice, the wife of defendant Alexander Everhart, the principal in the note.

The suit having originated before a justice of the peace, the defendants could make all defences without answer filed. And, under their first and second causes for a new trial, they insist that the consideration, in part if not in whole, of the note sued upon, was illegal and contrary to public policy.

We think the clause in the agreement, “that said Alice shall not appear and make any defence in said suit,” constituted some part of the consideration of the note, and that that part is so indefinite and uncertain as to be incapable of being separated from the remainder of the consideration. In 2 Bishop on Marriage and Divorce, 5th edition, sec. 239, we have the following language: “That an agreement made by a defendant in a divorce suit, to withdraw his or her papers, and make no defence, is void, as being against public

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policy; therefore a promissory note executed in pursuance of such an agreement, and in consideration thereof, is a contract which can not be enforced against the maker." And reference is made to the case of *Sayles v. Sayles*, 1 Fost., N. H. 312. The same doctrine is held by this court in the case of *Muckenbarg v. Holler*, 29 Ind. 139; and the following authorities are therein referred to: *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Goodwin v. Goodwin*, 4 Day, 343; *Weeks v. Hill*, 38 N. H. 199.

When the illegal and void part of the consideration of a note is so indefinite and uncertain that it can not be separated from the legal and valid part, then the whole note becomes invalid and void. *Hynds v. Hays*, 25 Ind. 31.

For these reasons we think the court below erred in overruling the motion for a new trial on the first and second causes stated.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and is hereby, in all things reversed, at the appellees' costs, and that the same be remanded to the court below, with instructions to grant a new trial.

73	412
131	385
73	412
136	391
73	412
147	100
73	412
148	631

No. 7550.

BROWN ET UX. v. HARMON ET AL.

WILL.—*Descents.*—*Heirship.*—*When Widow of Testator Deemed an Heir.*—*Limitation.*—A widow is to be deemed an heir of her deceased husband as to her inheritance of his lands under the statute of descents; but, when she claims as an heir under his will, the question whether she is such heir or not depends upon the intention of the testator, as gathered from the will alone; and where a will, after providing in terms for such widow during her widowhood, contained the further provision: "I also order that when my beloved wife * * * ceases to be my

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widow, and my youngest children come of age, all my real estate be divided equally among all my heirs," the words "all my heirs" must be construed as meaning only the children of the testator and their descendants, and not such widow.

From the Washington Circuit Court.

A. B. Collins, for appellants.

S. B. Voyles, for appellees.

NEWCOMB, C.—The appellants were the appellees in the case of *Harmon v. Brown*, 58 Ind. 207. In that case it was held that Penina Brown, one of the present appellants, who had been the widow of Cutliff Harmon, and to whom the entire estate of said Cutliff had been devised, "during her widowhood," had no estate, under that provision of the will, after her marriage to William Brown, her co-defendant below.

The will of Cutliff Harmon was made in December, 1860. He died early in 1868, and his will was probated in March, of that year. His widow, Penina, enjoyed the personal and real estate under the terms of the will, and elected to take thereunder and not under the statute of descents, as the complaint states. In July, 1877, Penina ceased, by her marriage with Brown, to be the widow of Cutliff Harmon. Soon after her remarriage a suit for partition of a large amount of real estate, of which Cutliff Harmon died seized, was commenced in the Washington Circuit Court, to which Penina Brown and her husband were made parties defendants, to answer as to any interest she might claim in said lands.

After the case was remanded, pursuant to the judgment of this court above referred to, Brown and wife filed an answer in two paragraphs, the first alleging that she was the owner of the lands sought to be partitioned, filing, as an exhibit, a copy of the will of Cutliff Harmon. The second paragraph claimed one-tenth of the lands, on the ground that Penina was one of the heirs of her former husband,

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and that, under the following clause of the will, she was entitled to share equally with his children and grandchildren in the lands of which he died seized. Correcting some errors of orthography and syntax, the clause of the will under which this claim is made reads thus: "I also order that, when my beloved wife, Penina, ceases to be my widow, and my youngest children come of age, all my real estate be divided equally among all my heirs." Demurrers were sustained to each paragraph of the answer, and, the appellants electing to stand by their answers, final judgment was rendered against them, and the lands were divided into nine portions, between the children and grandchildren of the testator.

Under the ruling of this court in the case between the same parties, reported in 58 Ind., *supra*, and which we are not disposed to question or reconsider, the circuit court properly sustained the demurrer to the first paragraph of the answer. Appellants' counsel claims in his argument that this answer sets up a complete defence by its averment that Penina Brown is the sole owner of the lands in controversy, and that although the answer alleges that Cutliff Harmon made a will, and a copy of it is filed as a part of the pleading, yet it can not be looked to in determining the sufficiency of the answer, because the copy was improperly filed, and its presence could neither aid nor mar the averments of the answer proper. But the complaint contained full averments as to the provisions of the will; that Penina elected to accept its provisions, and held the whole estate thereunder from the death of the testator in 1868 to her marriage, in 1877. The answer does not controvert these allegations of the complaint, or set up any title to the estate independent of the will; on the contrary, the answer evidently bases the claim of ownership on the will, and not on a title foreign to that.

The question presented by the second paragraph of appel-

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lants' answer was not passed upon when the case was first here.

It is claimed for the appellants that Penina Brown is legally an heir of her former husband so far as his real estate is concerned, and entitled to share with the children in the division of such realty. In support of this view we are referred to divers decisions of this court so construing the statute of descents. The rule has been definitely settled by repeated rulings of this court, that, when a husband dies seized of lands, his surviving wife takes the share allotted to her by the statute of descents as an heir of her deceased husband. *Frantz v. Harrow*, 13 Ind. 507; *Johnson v. Lybrook*, 16 Ind. 473; *Murray v. Mounts*, 19 Ind. 364; *The State, ex rel., v. Mason*, 21 Ind. 171; *McMakin v. Michaels*, 23 Ind. 462; *Rockhill v. Nelson*, 24 Ind. 422; *Rusing v. Rusing*, 25 Ind. 63; *Fletcher v. Holmes*, 32 Ind. 497; *May v. Fletcher*, 40 Ind. 575; *Bowen v. Preston*, 48 Ind. 367..

In *Fletcher v. Holmes*, *supra*, ELLIOTT, J., said of the heirship of a widow in such cases: "She can not, perhaps, be said to be an heir in the strict common-law sense of the term, by which heir is defined to be 'one born in lawful matrimony, who succeeds by descent, right of blood, and by act of God, to lands, tenements, or hereditaments, being an estate of inheritance.'

"The civil law recognizes several kinds of heirs. The relation of the widow, under our statute, as the recipient of real estate by descent from her husband, is very analogous to that of 'irregular heir' under the Louisiana code. * * The statute confers upon the widow the right of inheritance, and casts upon her property by descent; and if this does not make her an heir, in a technical sense, it, at least, clothes her with the material attributes of one, and places her in that relation."

From the foregoing authorities, Penina Brown would be deemed an heir of Cutliff Harmon, if she were claiming under the statute of descents; but as she waived her right

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under the statute, and accepted the will, and now asserts title in the paragraph of answer under consideration only to the equal portion allowed to the several heirs by the will, we must seek the meaning of the word "heirs" as used in that instrument, the primary rule of construction being that the intention of the testator, as gathered from the whole will, must control. When the general term "heirs" is used in a will, it will be construed to mean child or children, if the context shows that such was the intent of the testator. *Jones v. Miller*, 13 Ind. 337; *Rusing v. Rusing*, 25 Ind. 63; *Rapp v. Matthias*, 35 Ind. 332.

Thus we are led to the inquiry, in what sense did the testator use the words "all my heirs," in providing for the final division of his real estate? Did he intend to include all whom the law might class as heirs in case of intestacy, or did he use the phrase in the popular acceptation as descriptive of children or the nearest of kin? We think he employed the expression in the latter sense. Prior to the statute of descents of 1852, a widow was not, in either the legal or popular understanding of the term, an heir to her husband's real estate. The first intimation we find in our reports that, by the statute, she takes lands as an heir, is in the case of *Frantz v. Harrow*, 13 Ind. 507, decided in December, 1859, where it was said: "The widow, if she be entitled to one-third of the land in fee, would seem to take it as heir to her husband. The law entitling her to it, declares that it shall descend to her." The other rulings above cited, which have firmly established the principle more hinted at than decided in *Frantz v. Harrow*, *supra*, were all made subsequent to the execution of Cutliff Harmon's will. Our reports show that it was some years after the date of this will before even the lawyers of this State came to fully understand that the statute placed the widow in the attitude of an heir of her deceased husband, and it may reasonably be assumed that the testator did not, in this case, use the

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term "heirs" in a sense to which the popular mind had not become habituated.

2. There is no clause of the will indicating a purpose to make provision for the wife, except during her widowhood, unless it is to be found in the clause under which she makes her claim to one-tenth of the real estate. After devising all his property to his widow, "during her widowhood," the testator provided that, in case of her death before all his children came of age, the proceeds of his real estate should go to the support of his minor children. The will then recited certain advances, unequal in amount, that had been made to a part of his children, and provided that, at the death of his widow, all his personal property should be sold, and the proceeds so divided among all his children as to make them all equal; that is, as we construe it, that, in dividing the proceeds of the personal property, the shares should be equalized by taking into account the advances received by certain of the children. Then follows the provision for an equal division, among all his heirs, of the real estate, after his wife, Penina, should cease to be his widow. We think the words, "all my children," in the one clause, and "all my heirs," in the other, were used by the testator in the same sense, and that he meant, by both, to describe his children. He provided for an unequal division of his personalty in order to properly charge advances to those of his children who had been thus favored, and having so provided for securing equality among his children in the distribution of his personal estate, he followed that, in the next sentence, with the clause in question, by which an equal division was directed of his real estate, at such time as his wife should cease to be his widow, and the youngest of his children should become of lawful age.

The objects of the testator's bounty seem to have been his children exclusively, after the widowhood of his wife should cease. This might terminate either by her death or

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remarriage. In the former case, it is hardly supposable that the testator intended a tenth part of his real estate to be set off in her name, and there is nothing in the will indicating a purpose to place her on a footing with his children in the event of a second marriage. On the contrary, we think he meant his children and the descendants of deceased children, by the phrase "my heirs," in the clause of his will making a final disposition of his real estate, and that he had no thought of the then almost unknown but now established doctrine, that in this State a widow inherits lands as heir to her deceased husband.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and is, in all things affirmed.

No. 7629.

CARPENTER v. GALLOWAY.

73	418
147	681

73	418
156	505

STATUTE OF FRAUDS.—Parol Agreement.—A verbal agreement to purchase all the mules which may be bred from a certain jack during a certain season, at the sum of \$46 for each, is within the seventh section of the statute of frauds, and can not be enforced, unless the amount claimed is shown to be less than \$50.

SAME.—Where a contract affected by the statute of frauds has been put in writing, and afterward orally modified, such modified agreement is within the statute.

PRACTICE.—Answers to Interrogatories.—As to when answers to special interrogatories will not overturn the general verdict, see opinion.

SAME.—Uncertainty, How Corrected.—Venire de Novo.—Where an interrogatory is direct and pertinent, and the answer of the jury is uncertain, it is error for the court to refuse a motion for a *venire de novo*, or, upon request, to require the jury to return a direct and certain answer.

From the Delaware Circuit Court.

W. March, for appellant.

MORRIS, C.—This suit was brought upon a note for \$75.00,

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given by the appellant to William Bryan, and by him assigned to the appellee. The appellant answered the complaint in two paragraphs. The first paragraph alleges that the note in suit was given in part payment for a jack, purchased by the appellant of the payee of the note, William Bryan ; that, to induce him to make the purchase, Bryan falsely and fraudulently represented to him that the jack was of the Mammoth breed and only three years old ; that the representations were made to deceive him, he having no knowledge of the jack, and being ignorant of his breed and age ; that he believed the representations to be true, and, relying upon them, purchased the jack of Bryan for \$225, giving three notes of fifty dollars each, which had been paid, and the note in suit. He avers that the jack was not of the Mammoth breed, and was from ten to twelve years old ; that he was worth little or nothing for breeding purposes, and was worthless for all other purposes ; that, therefore, the consideration of the note had failed.

The second paragraph, which is called an answer, cross complaint and set-off, after stating that the note in suit was given in part payment for a jack, purchased by the appellant of Bryan, sets up a written contract, made between them at the time the jack was purchased, and before the assignment of the note to appellee, by which he agreed to stand the jack for mares during the season of 1864, and to contract for mules of the jack's getting during that season from mares 15½ hands high, and for all mules bred from him that season four feet in height, Bryan agreeing on his part to purchase all such mules from the appellant at \$46.00 each, if delivered to him at the town of Zenas, Jennings county, Indiana, on the 15th day of September, 1865. It is alleged that the contract was in the possession of a third person in the town of Zenas, and a copy of it, therefore, could not be filed with the complaint. It is also stated that subsequently it was orally agreed between the parties, as a part of the original contract, that Bryan should purchase of appellant, at \$46.00

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each, all mules bred from said jack and good brood mares, that season, without regard to the height of the mares or mules; that the appellant agreed with the owners for forty-six mules at \$40.00 each, and the use of the jack included, and had them at the town of Zenas on the 15th day of September, 1865, and there tendered them to Bryan; that they were of the description required by said contract, but that Bryan refused, without sufficient cause, to accept any of said mules, except three, although said mules were bred from said jack during the season of 1864, and from mares 15½ hands high, or from good brood mares, or were four feet high; that they were in fact worth only \$40.00 each; that by the refusal of Bryan to accept the mules as agreed, he lost the use of the jack and \$6.00 on each mule, amounting to \$258.00. He offers to set off so much of said sum as will equal any sum found due upon said note, and demands judgment for costs.

The appellant replied by denial to the first paragraph of the answer, and demurred to the second or cross complaint. The demurrer was sustained, and the appellant excepted.

The cause was submitted to a jury, who returned a general verdict for the appellee, and the following answers to interrogatories submitted to them at the instance of the appellant:

“1. Was not the sole consideration of the note in controversy a part of the price of a jack sold to the appellant by Bryan, the payee of the note, for \$225; and has not the balance of the purchase price, \$150, been paid by the defendant, Carpenter, before the commencement of this action? Ans. Yes.

“2. Had the defendant ever seen, or had he any knowledge of, the jack before the time he purchased him of said Bryan? Ans. No.

“3. Did not the defendant, Carpenter, rely upon the rep-

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representations made by said Bryan, at the time he made the purchase, in regard to the age and breed of the jack? Ans. Yes, to some extent, but could have ascertained otherwise.

“4. Were the representations made by said Bryan, in relation to the breed and age of the jack, true, and was the jack as represented by him? Ans. As to age, no; as to breed, yes.

“5. What was the actual value of the jack, at the time he was purchased of said Bryan by the defendant? Ans. \$225.

“6. What would have been the value of the jack, had he been as represented by said Bryan? Ans. \$350.

“7. Did the defendant say or do anything to induce the plaintiff to procure the note at any time before it was assigned to her? If so, what was it, and when? Ans. No.”

The court, of its own motion, submitted the following interrogatory to the jury :

“8. Did Bryan, the payee of the note, at the time of the sale of the jack, falsely and fraudulently, for the purpose of inducing the defendant to purchase the jack, represent to the defendant that the jack was only three years old, and of the Mammoth breed? If so, were they false and made to deceive, and did the defendant believe them to be true?”

The jury answered this interrogatory as follows :

“To all but the latter, no; to the latter, yes.”

At the proper time, as appears by the bill of exceptions, the appellant moved the court to direct the jury to return to their room and make their answers to the third, fourth and eighth interrogatories more definite, which motion the court overruled, to which decision, at the proper time, appellant excepted.

The appellant then moved the court for judgment in his favor upon the special findings of the jury, which motion the court overruled, and he excepted.

The appellant also moved the court for a *venire de novo*,

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which motion was overruled, and he excepted. He also moved the court for a new trial, which was overruled, and he excepted.

The errors assigned are as follows :

1. The court erred in sustaining the demurrer to appellant's cross complaint.

2. The court erred in refusing to render judgment in favor of the appellant upon the special finding of the jury.

3. The court erred in overruling the appellant's motion for a *venire de novo*.

4. The court erred in refusing to direct the jury to answer more definitely the third, fourth and eighth interrogatories.

5. The court erred in overruling appellant's motion for a new trial.

We will consider the questions in the order in which they are assigned for error. Did the court err in sustaining the demurrer to appellant's cross complaint?

The first contract set up in the cross complaint was in writing, but it was essentially modified by a subsequent verbal contract. By the written contract, Bryan agreed to buy mules of the height of four feet, or bred from mares fifteen and a half hands high. By the subsequent verbal contract, he agreed to purchase all the mules bred from the jack during the season of 1864, from good brood mares. The verbal agreement obviously changes and modifies the written agreement, not simply as to the manner of its performance, but in its terms. It is for a breach of this modified agreement that the appellant demands damages. It is, as he alleges, this modified agreement he offered to perform, and Bryan refused to carry out on his part. The appellant does not allege an offer to perform the written contract, nor does he claim to have suffered damages by reason of its non-performance by Bryan.

Is this modified contract within the 7th section of the stat-

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ute of frauds? and, if so, can the appellant, under the circumstances, insist upon it as a defence to the action? Is the price agreed to be paid for the mules presumably in excess of fifty dollars? It may be said that the number of mules which would be delivered upon the 15th day of September, 1864, was uncertain; that the appellant might not be able to contract for more than one, and, therefore, as the sum to be paid for one was \$46, it would not be within the statute. But, on the other hand, it may be said that more than one mule might be delivered, and, therefore, the price might exceed \$50. In the case of *Watts v. Friend*, 10 B. & C. 446, the defendant agreed to supply the plaintiff with a quantity of turnip seed, and the plaintiff agreed to sow it on his own land, and sell the crop of seed produced, at £1 1s. the Winchester bushel. The seed so produced, at the price agreed upon, exceeded £10. It was held by the court that the contract was within the statute. Browne, in his work on the Statute of Frauds, approves this decision, and says that, in deference to the statute, the parties seeking to enforce such a contract should show that the price of the goods to be delivered did not exceed the amount named in the statute. Sec. 312; *Bowman v. Conn*, 8 Ind. 58; *Brown v. Sanborn*, 21 Minn. 402.

“It seems,” says the same author, “to be well established that when a contract, affected by the statute, has been put in writing, and the plaintiff, in case of subsequent oral variation of some of the terms of the written agreement, declares upon the writing as qualified by the oral variation, he can not prevail.” Browne Statute of Frauds, sec. 411, and cases cited.

We conclude that the contract set up in the cross complaint, if otherwise valid, is within the statute of frauds, and therefore void. *Krohn v. Bantz*, 68 Ind. 277. The court did not err in sustaining the demurrer to the cross complaint. Nor do we think the court erred in refusing to render judgment in favor of the appellant upon the special findings.

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There is not enough found in them to justify a judgment for the appellant. We think, however, the court below erred in refusing the motion of the appellant for a *venire de novo*.

The third interrogatory is pertinent and direct. The answer is uncertain and indefinite. The jury say that the appellant relied to some extent upon the representations of Bryan as to the age and breed of the jack, but that the age and breed might have been otherwise ascertained. Just what is meant by the answer of the jury no one can tell. Whether the means of ascertaining the jack's age and breed were, at the time he purchased, within the appellant's reach, is left uncertain; and to what extent, whether in a material degree he relied upon the representations of Bryan, is also uncertain. The answer to the eighth interrogatory is still more uncertain. At the proper time, the appellant asked the court to require the jury to make these answers more certain. This the court refused to do.

In the case of *Peters v. Lane*, 55 Ind. 391, it is held, that where an interrogatory is direct and pertinent, and the jury return an uncertain answer, it is the duty of the court, if requested so to do before the jury is discharged, to require them to return a direct and certain answer. It is also held, that, where in such case the answer is uncertain, a *venire de novo* should be awarded. *The Cincinnati, etc., R. R. Co. v. Washburn*, 25 Ind. 259; *Trout v. West*, 29 Ind. 51; *Vater v. Lewis*, 36 Ind. 288.

For this error, the judgment below ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and the same is hereby, in all things reversed, at the costs of the appellee; that it be remanded for further proceedings, in accordance with this opinion.

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No. 7805.

WALTERS ET AL. v. WALTERS.

73	425
133	114
73	425
139	348
73	425
141	51

MORTGAGE.—Heirs of Deceased Mortgagor.—Real Estate.—A mortgage on real estate, made by a decedent in his lifetime, his wife not joining, is good as against his heirs other than the widow, and is good as against her, if given for purchase-money.

SAME.—Taking of New Mortgage for Old.—Lien.—The taking of a new note and mortgage, by the mortgagee, for the same debt, upon the same lands, will not discharge the lien of the first mortgage, but the lien thereof will be continued in the new mortgage. But, if the new note and mortgage were taken as a payment and satisfaction of the first, or if they were given in settlement of mutual running accounts, of which the first mortgage debt was only a part, the rule would be otherwise.

SAME.—Consideration.—Parol Evidence.—The consideration of a mortgage may be shown by parol evidence.

From the Cass Circuit Court.

D. B. McConnell, A. S. Guthrie and D. B. Graham, for appellants.

M. Winfield and Q. A. Myers, for appellee.

NEWCOMB, C.—This action was brought by the appellee against the heirs of Joseph Walters, deceased, Rebecca Walters, his widow and administratrix, and John Hines, who was alleged to be a junior mortgagee, to foreclose two mortgages executed by Joseph Walters, in his lifetime, to appellee.

There were demurrers to the complaint, motions for a new trial and in arrest of judgment; all of which present the same questions, in different forms. Exceptions were also taken to the admission of certain evidence upon the trial, and to an instruction given by the court to the jury, which were properly saved by the motion for a new trial.

The first paragraph of the complaint counts upon a mortgage given in 1872, to secure notes amounting to \$624, and describes the land as the north-east fourth of the north-west quarter of section 3, town 28, etc., in Cass county.

The second paragraph is on a mortgage executed in 1876, to secure a note of five hundred dollars, and in this mort-

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gage the land is described as forty acres off the north-east corner of the north-west quarter of section 3, same township and range.

Both paragraphs allege that the notes therein described were given for the purchase-money of the land mortgaged.

The third paragraph sets forth the making of the two mortgages described in paragraphs one and two, and states that the mortgage and note of 1876 were given in lieu of the notes and mortgage of 1872, and to secure the balance of the same indebtedness.

Each paragraph alleges that, in 1875, Joseph Walters executed to the defendant Hines a mortgage on a part of the same lands, but that the latter had full notice, when he accepted the mortgage, of the prior mortgage to plaintiff, and that the latter was given for the unpaid purchase-money of the real estate in question. Neither the deed of 1872, to Joseph Walters, nor his mortgage of that date, were recorded. It appeared in evidence, though not stated in the complaint, that a subsequent deed was executed by Jacob to Joseph Walters, of the same date of the second mortgage, in which the land was described as it was in the last named mortgage. There seems to have been no controversy between the parties that the description in the second deed and mortgage was the correct one, nor that the first mortgage was intended to embrace the same description as the last.

Rebecca Walters answered, *inter alia*, that she was the widow of Joseph, and his wife at the date of the execution of the several mortgages; that the second mortgage was not given exclusively for purchase-money, but in settlement of accounts, including other items of indebtedness; that she did not join in the execution of either mortgage; that the first mortgage was extinguished by the second, and that she, as widow, was entitled to one-third of the land in controversy.

The defendant Hines set up his mortgage in answer, and denied that he had notice of plaintiff's mortgage, or that the

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purchase-money, owing by Joseph Walters, was unpaid. He also filed a cross complaint, praying the foreclosure of his mortgage. Divers issues of fact were formed on the several answers, and the case was submitted to a jury, who found a general verdict in favor of the plaintiff, and, in answer to interrogatories submitted by the defendants, that the mortgage of July 15th, 1876, was given for the purchase-money of the land in controversy, and for no other consideration. So far as the heirs of Joseph Walters, other than his widow, were concerned, the verdict and judgment were clearly right, as the mortgage was good as to them, whether given for purchase-money or some other consideration.

For the widow, it is claimed that the lien of the plaintiff below dates from the execution of the last mortgage only, and that she, not being a party thereto, is entitled to one-third of the land as against the mortgagee. This is the question involved in her demurrers to the several paragraphs of the complaint, and her motions for a new trial and in arrest of judgment.

A widow's rights in lands, purchased by her husband and mortgaged for the purchase-money, are defined by section 31 of the statute of descents as follows: "Where a husband shall purchase lands, during marriage, and shall, at the time of purchase, mortgage said lands to secure the whole or part of the consideration therefor, his widow, though she may not have united in said mortgage, shall not be entitled to her third of such lands, as against the mortgagee or persons claiming under him; but she shall be entitled to the same as against all other persons." 1 R. S. 1876, p. 413.

The mortgage of 1872 was made at the time of the purchase, and it is clear that the widow can not assert title against the vendor unless the execution of the second mortgage is to be deemed an extinguishment and satisfaction of the debt evidenced by the first. That such was not the intention of the parties, we think evident. The second mort-

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gage was made primarily for the purpose of giving a more accurate description of the property mortgaged. The original debt, so far as it was unpaid, remained. The equities of the vendor were the same. No intent was manifested to waive the lien for purchase-money secured by the first mortgage. The surrender of the unpaid notes of 1872, and taking a new note for the balance due, did not of themselves discharge the lien of the first mortgage. *Dumell v. Terstegge*, 23 Ind. 397; *Jones Mortgages*, secs. 555 and 927; *Flower v. Elwood*, 66 Ill. 438; *McCormick v. Digby*, 8 Blackf. 99; *The Bristol Milling, etc., Co. v. Probasco*, 64 Ind. 406. Nor do we think the acceptance of the second mortgage, under the circumstances of the case, was an extinguishment of the lien for the purchase-money secured by the first.

In *Burns v. Thayer*, 101 Mass. 426, it was held that where a husband gave a mortgage for the purchase-money of real estate, and this mortgage was afterward discharged, and at the same time, and as a part of the same transaction, a new note and mortgage were given for the same purchase-money debt, the instantaneous seisin of the husband did not operate to give the wife a homestead right in the premises. The court said: "The release of the old mortgage and the making of the new one appear to be parts of one transaction only, and the seisin thereby acquired by Burns, between the release and the new mortgage, was but momentary. Such a seisin would not give his wife a right of dower." And see *Gregory v. Thomas*, 20 Wend. 17; *Dillon v. Byrne*, 5 Cal. 455; *Swift v. Kraemer*, 13 Cal. 526. In this case it is said: "We regard the cancellation of the old mortgages and the substitution of the new, as contemporaneous acts. It was not creating a new incumbrance, but simply changing the form of the old. A Court of Equity, looking to the substance of such a transaction, would not permit a release, intended to be effectual only by force of, and for the purpose

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of, giving effect to the last mortgage, to be set up, even if the last mortgage was inoperative.”

In *Packard v. Kingman*, 11 Iowa, 219, it was decided that the taking of a new note and mortgage to secure an indebtedness already evidenced by a note, and secured by a mortgage on the same property, does not, even where the first note and mortgage are cancelled, operate to discharge the lien of the first mortgage. See, also, *Jones Mortgages*, secs. 924 and 927; *Story Equity*, secs. 1035c and 1035e. The principle of the foregoing authorities accords with equity and justice; but there is no equity in the claim of the widow that she shall have land for which the vendor has not been paid.

The defendant Hines was an incumbrancer for value, but he took his intermediate mortgage with notice of the plaintiff's prior lien, and that the latter was for purchase-money. By the authorities above cited, his equity is subordinate to that of the appellant. The very point in his case was decided in *Gregory v. Thomas* and *Dillon v. Byrne, supra*. And see *Houston v. Houston*, 67 Ind. 276; *Christie v. Hale*, 46 Ill. 117; *Shaver v. Williams*, 87 Ill. 469.

The court gave the following charge to the jury, to which the defendant Rebecca Walters excepted:

“The taking of a new note and mortgage, by the mortgagee from the mortgagor, for the same debt upon the same lands, would not discharge the lien of the first mortgage, but that lien would be continued in the new mortgage. This would be otherwise if the second debt was created by the parties getting together and having a settlement of mutual running accounts and other debts, among which was the first mortgage debt, and a balance is found due the plaintiff; this balance, being put in a new note and mortgage, that would form a new consideration, and the lien of the first mortgage would be divested; or if, at the time the second mortgage was taken, it was the agreement and understand-

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ing that it was to be in full payment and satisfaction of the first mortgage, that would operate as a cancellation of the first mortgage." We regard this instruction as a correct statement of the law, and unobjectionable.

Objection was also made at the trial to the admission of oral evidence as to the consideration of the mortgages to appellant. There was no error in this. The rule, that the consideration of a written contract may be proven by parol, is too well settled to require the citation of authorities.

Among the causes for a new trial, filed by the defendant Hines, was an alleged error of the court in sending the jury back to their room to amend their verdict, after the same had been read in open court, and in permitting the jury to amend their verdict, by finding for him on his cross complaint; but, as there is nothing in the bill of exceptions to show that this was done, the question is not before us.

Much research and ability have been displayed by counsel in discussing the question whether the acceptance by Jacob Walters of the mortgages we have considered was or was not a waiver of his equitable vendor's lien. We have not considered that question, as it does not arise in the case. The action is one of foreclosure of a mortgage, and we have viewed it in that light only. The complaint is not predicated on a vendor's equitable lien. The cause was justly decided below, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and is hereby, in all things, affirmed, at the costs of the appellants.

No. 7410.

THE AMERICAN EXPRESS CO. ET AL. v. PATTERSON.

CORPORATION.—*Express Company.*—*Power to Cause Arrest by Agent.*—*Liability for Acts of.*—An express company has the power, by proper and lawful modes, to pursue and cause the arrest and punishment of

73	430
129	188

73	430
135	520

73	430
138	161
139	551

73	430
153	431

73	430
167	546

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any one who has stolen or embezzled the money or property of the company, or for which it was responsible, and may employ an agent for such purpose; but for any trespass committed by him in the prosecution of such employment such company is liable.

FALSE IMPRISONMENT.—*Pleading.*—*Complaint.*—*Demurrer.*—*Practice.*—*Evidence.*—In an action against an express company and others, to recover damages for arrest and imprisonment, an allegation in the complaint that the injury was caused “at the instigation and procurement” of such company, is sufficient on demurrer, and, without a motion to make specific, evidence is admissible tending to show the truth thereof.

SAME.—*Liability of Tortfeasors.*—*Judgment.*—*Contribution.*—*Verdict.*—*Ventre de Novo.*—*Practice.*—*Trespass.*—The liability of tortfeasors is not joint, but several. An action may be had against all or any number of them, and separate actions may be prosecuted at the same time against them therefor, and separate verdicts and judgments obtained, whether for the same or different amounts, though the plaintiff can have but one satisfaction; but, whether the judgment be joint or several, there is no right of contribution which can be enforced as between the defendants, and, where the action is against all, the fact that the verdict is silent as to one is no cause for a *venire de novo*.

SAME.—*Evidence.*—*Special Constable.*—*Warrant.*—*Malicious Prosecution.*—In an action for false imprisonment, evidence of the proceedings before the justice, after the arrest of the plaintiff by a special constable on a warrant directed to any constable of the county, is admissible: Such arrest is illegal, and evidence thereof tended to show false imprisonment only, and not a malicious prosecution.

SAME.—*Habeas Corpus.*—In such action evidence of the proceedings on a writ of *habeas corpus*, by which the plaintiff was discharged from custody, is competent and pertinent.

SAME.—*Evidence of Character of Plaintiff.*—*Mitigation of Damages.*—Where, in such action, the defendants plead, in mitigation of damages, that they acted in good faith in causing the arrest, and adduce evidence thereunder tending to cast suspicion on the plaintiff's character, evidence of his general good character, and of his reputation for honesty and integrity, is admissible to rebut the claim of such good faith and belief of his guilt, on the part of the defendants, though not admissible in the first instance, as in cases of malicious prosecution.

SAME.—*Special Damage.*—*Loss of Employment.*—*Hearsay Evidence.*—Proper evidence by the plaintiff in such a case, of the loss of a situation by reason of the arrest, is admissible; but evidence of the statements of another to that effect is mere hearsay, and inadmissible as evidence of the fact.

From the Delaware Circuit Court.

The American Express Company *et al.* v. Patterson.

W. March, J. N. Templer and R. S. Gregory, for appellants.

J. S. Buckles and J. W. Ryan, for appellee.

WOODS, J.—Complaint in three paragraphs for false imprisonment, to each of which paragraphs the appellants jointly and severally demurred. Demurrers overruled, and exception. Issues of fact; jury trial; verdict and judgment for the plaintiff. Motions for a *venire de novo* and for a new trial made and overruled, and exception.

It is not necessary to set out the complaint in full. The counsel for the appellants admit that the three paragraphs are all based on the same transaction, and do not differ except in giving details, and in the method of charging the several defendants, differences which will be noticed so far as it may become necessary.

It is objected to the first paragraph of the complaint that it shows no cause of action against the defendant Richey.

The verdict was silent concerning Richey, and before taking judgment thereon against the appellants, the appellee dismissed the case as to him. He does not complain, and is not a party to the appeal. It is clear, for reasons which will be stated when we come to consider the motion for a *venire de novo*, that in this respect the court committed no error.

The further objection is made that the paragraph contains no direct charge against the express company; that the acts of Hazen, as alleged, constituted an unlawful trespass, an assault and battery, for which the corporation could not be held liable, without showing that it authorized him to do the acts complained of, or that he did them in the line of his duty as agent of the company. And it is contended, in this connection, that the complaint is not made good against the company by the averment which is made, that the acts of Hazen were done “at the instigation and procurement of the

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defendant, the American Express Company ;” that the words “instigation and procurement” are not terms which of themselves convey any legal charge ; that the means and the manner of instigation and procurement should have been stated, just as in making a charge of fraud it is necessary to allege the facts which constitute the fraud.

We do not think of more apt words with which the company could have been charged with responsibility. But, if the objection were well taken, the pleading would nevertheless be good on demurrer, but subject to a motion to be made more specific. Stated succinctly, the complaint shows that on the 18th day of September, 1876, the plaintiff was arrested by said Hazen, without process or warrant, at St. Paul, Minnesota, on the false and groundless charge of the larceny of \$1,015 from the office of said company in Muncie, Indiana ; that said Hazen then and there forcibly took the plaintiff to the office, and before the officers of said company in said city, where, by the direction and order of the officers of said company, the plaintiff was further imprisoned, his baggage searched, the keys to his baggage taken from him by force and violence, his baggage rifled, and papers and other articles taken therefrom and forcibly and without right detained from him ; that, on the 20th day of said month, said defendants still holding the plaintiff in custody by violence, as aforesaid, forcibly and by intimidation and threats, took him from said city of St. Paul to Indianapolis, Indiana, at the instigation and by the procurement of the defendants, the American Express Company, Edward W. Sloan, one Julien, and William Brown, and that the parties last aforesaid there forcibly with strong hand and without legal authority or warrant of any kind, forcibly and by threats kept the plaintiff imprisoned and restrained of his liberty for six days, and denied him access to friends, attorneys, or any persons except said Hazen and the other agents of said company, and said Sloan and Julien, and so

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held him imprisoned until set at liberty on a writ of *habeas corpus*, directed to and against said defendants, and on which they produced him, without alleging anything against him.

The transaction thus shown concerned the business of the company; that is to say, the recovery of money lost by the company, and which the plaintiff was supposed, by the officers of the company, to have stolen; or, if not the recovery of the money, then, at least, the punishment of the supposed thief; and probably both these objects were aimed at. We think it clear that the corporation had the power, by proper and lawful modes, to pursue and cause the arrest and punishment of any one who had stolen or embezzled the money or property of the company, or for which it was responsible. If not expressly granted it, this power must be implied from the nature and necessities of the business of an express company. Such companies must be deemed to be empowered to employ agents to do such work, as much as to accomplish its ordinary purposes and business. It sufficiently appears that the defendant corporation did employ, instigate and procure the action of Hazen, as set forth. From this it necessarily follows that the company must be held liable for any trespass committed by her said agent in the prosecution of that employment, according to the general rule by which the master is held responsible for the conduct of his servant. That rule, as applicable to corporate bodies, has been laid down for this State, and, as we believe, in harmony with the current of authority, as follows: "We think it is well settled that a corporation is liable for the wilful acts and torts of its agents committed within the general scope of their employment, as well as acts of negligence; and that the corporation is thus bound, although the particular acts were not previously authorized, nor subsequently ratified, by the corporation." *The Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116; *The Indianapolis, etc., R. W. Co. v. Anthony*, 43 Ind. 183. An apt

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illustration, as well as interesting discussion of the doctrine, is found in *Craker v. The C. and N. W. Railway Co.*, 36 Wis. 657, S. C., 17 Am. Rep. 504, wherein the railway company was held liable for the act of a conductor who kissed a female passenger against her will.

The paragraph of the complaint under consideration charges directly that the alleged injury to the plaintiff was done at the instigation and procurement of the appellant, the express company. The demurrer admits the fact, and under such general averment, there having been no motion for a more specific statement of the facts, it was competent for the plaintiff to offer any evidence which tended to show the truth of the allegation. *The Ohio, etc., R. W. Co. v. Collarn*, ante, p. 261; *The Brookville, etc., Turnpike Co. v. Pumphrey*, 59 Ind. 78; *The Pennsylvania Co. v. Sedwick*, 59 Ind. 336; *The Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297; *Hildebrand v. The Toledo, etc., R. W. Co.*, 47 Ind. 399.

It follows from what has already been said, that the court committed no error in refusing the fifth instruction asked by said defendant, which was this, viz. :

“And if in this case there is no evidence that the American Express Company expressly authorized or directed any person to illegally arrest and imprison, or hold in custody, the plaintiff, William Patterson, or expressly sanctioned it, and if the jury believe from the evidence that the defendant, the American Express Company, at the time of the alleged grievances, was a corporation engaged in doing a legitimate express business through her agents, they should find their verdict for that defendant, although they should believe from the evidence that the plaintiff had been illegally arrested and imprisoned by persons who were agents, or acting as agents, for the company.”

If true, this instruction amounts to this : That an express company may employ agents to pursue, arrest and prosecute, in lawful ways, those who have, or are supposed to have,

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stolen money or goods from the company; but if, in the course and scope of his general employment for those purposes, the agent negligently or wilfully commits a trespass and falsely imprisons the accused or suspected one, the company is not liable unless it expressly authorized or sanctioned the illegal arrest or imprisonment. As before stated, this is not the law.

The theory of this instruction is also urged in support of the claim that the evidence does not sustain the verdict, but it is no better as applied to the evidence than in the instruction, and was rightly overruled in both.

The next claim is that the court erred in overruling the motion for a *venire de novo*; and this is claimed because the verdict is silent as to the defendant Richey. Before taking judgment on the verdict against the other defendants, as has already been stated, the plaintiff dismissed the case as to the said Richey, who made no objection thereto, and did not join in the motion for a *venire de novo*. We are not able to see that the action of the court harmed the appellants. The liability of tortfeasors is not joint, but several. The action may be against all, or one, or any number of them. Separate actions may be prosecuted at the same time against the respective parties charged with the same wrong, and separate verdicts and judgments taken against them, whether for the same or for different amounts, though the plaintiff can have but one satisfaction; but, whether the judgment be joint or several, there is no right of contribution which can be enforced as between the defendants. There is, therefore, no reason for a *venire de novo* in such a case, and the law in fact does not require it.

It is not out of the way to observe that if the complaint did not state a good cause of action against Richey, as appellants contend, there was certainly no available error in the dismissal and in the refusal of the court to grant a new *venire*. Had there been a verdict against said Richey, the judgment

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must have been arrested as to him on his motion to that effect.

In the second paragraph of the complaint, besides charging the same false imprisonment as is shown in the first, it is further alleged that afterward, as an additional act of imprisonment and trespass, the defendants procured Hazen to file his affidavit before a justice of the peace, of Delaware county, Indiana, charging the plaintiff with the larceny of said money of the company; but that on the day set for trial the defendants, who were all present with counsel, refused to prosecute, and the plaintiff was discharged by the justice, etc. Complaint is made of the admission of evidence to show these proceedings. We do not perceive that error was committed in admitting this proof. The warrant on which the arrest was made was directed to any constable of the county, but was put in the hands of a special constable, who arrested the plaintiff and took him before the said justice of the peace. The arrest was therefore illegal on the face of the papers, and the evidence tended to show false imprisonment only, and not a malicious prosecution, as counsel contend. *Hayden v. Souger*, 56 Ind. 42.

For the same reason, there was no error in refusing the eighth instruction, wherein the appellant requested the court to charge the jury to give no weight to this evidence, unless it was shown that the prosecution was malicious and begun without reasonable or probable cause. It was not a case of malicious prosecution, but an illegal one on an illegal warrant, involving no question of malice or of probable cause as an essential to the right of action.

The objection made to the introduction in evidence of the proceedings on *habeas corpus* does not seem to have been well taken. The facts concerning that procedure were averred in the complaint, and were connected with, and indeed constituted a part of, the transaction complained of. The imprisonment of the plaintiff was terminated by his discharge

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on the writ, and the alleged conduct of the defendants in reference thereto was not without a significance quite pertinent to the issue in the case.

Counsel in their brief also complain that the plaintiff was allowed to introduce evidence of his general character. The question presented is not free from doubt, but we have concluded, that, under the circumstances of the case, evidence of the plaintiff's general good character, and of his reputation for honesty and integrity, was admissible. It has already been shown that the alleged false imprisonment was the arrest of the appellee upon a charge or suspicion that he had stolen a package of money from the express company. It was therefore competent for the defendants to "show in mitigation of damages, every circumstance connected with the transaction that has a tendency to show that he acted with honest motives and good faith in making the arrest," and "that the plaintiff was strongly suspected and accused by the public for the crime for which he was arrested." Eggleston Damages, sec. 363. The appellants did, accordingly, present a special plea, in mitigation of damages, setting out at great length and in detail the circumstances on which they claimed to have acted, in the belief of the plaintiff's guilt, and in support of this plea gave evidence on the trial.

Wharton, in his Law of Evidence, sec. 47, says that the "English and American courts have agreed in holding that, so far as concerns the proof in civil issues, the character of either party is as a rule irrelevant. So far has this been carried that in actions for malicious prosecution and for false imprisonment, the defendant, to sustain the defence of probable cause, can not put the plaintiff's bad character in issue; though this proof may be offered in mitigation of damages." See, also, 1 Greenleaf Evidence, secs. 54, 55, 469. In *Israel v. Brooks*, 23 Ill. 526, followed in *Blizzard v. Hays*, 46 Ind. 166, it is held, that, in an action for malicious prosecution of the plaintiff on a charge of crime, it is com-

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petent for the plaintiff to introduce evidence to show that, before and at the time of the prosecution complained of, he was a man of good moral character and reputation in the community where he lived, and that the defendant had knowledge of this, as tending to show a want of probable cause; and, on the other hand, his bad character may be shown by the defence, as good ground for augmenting a suspicion against him. "We know," says the Illinois court, "in no actions save criminal prosecutions and actions for defamation, can the character of the party, as a general rule, be inquired into, but in such a case as this, there seems to be great propriety in permitting it, for the reasons here given." The reasons for permitting it in the case at bar seem to be equally cogent and convincing. The evidence was not admissible, in the first instance, in this case, as it would be in a case of malicious prosecution; but, after the introduction by the defendants of evidence to support their plea in mitigation of damages, it was plainly pertinent, and likely to be of great weight, if the plaintiff could prove a good character and reputation in rebuttal to the circumstances adduced against him, and in contradiction of any claim or pretence on the part of the appellants, that they acted in good faith in the belief of his guilt. The evidence is just as clearly relevant and pertinent in rebuttal of the alleged good faith of the defendants in making an arrest of the plaintiff, as it would have been, in the first instance, in an action for malicious prosecution, to show bad faith and want of probable cause. We conclude, therefore, that, notwithstanding the defendants had offered no direct evidence against the general character of the plaintiff for honesty or integrity, that character was, in an important sense, involved in the issue presented by the answer in mitigation; and, the evidence having been offered only in rebuttal, the court committed no error in admitting it.

In reason and good conscience, it must be true, that when the defendant may offer proof of the plaintiff's bad charac-

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ter in mitigation of damages, and does put in evidence a series of circumstances of a nature to cast suspicion on the plaintiff, in respect of his character, the plaintiff must be allowed to rebut with proof in support of his good reputation. But, besides allowing proof of his general character for honesty, the court, in this case, permitted the plaintiff, over proper objection by the defendants, to produce evidence of his reputation for truth and veracity. No evidence to impeach that character had been adduced, and his character, in that respect, was not relevant to, or directly involved in any issue in the case. We do not perceive on what ground the introduction of this evidence can be justified. But the counsel for the appellants have not argued this question, and we need not decide it. *Whitesell v. Heiney*, 58 Ind. 108; *Gebhart v. Burkett*, 57 Ind. 378.

An exception was reserved to the ruling of the court in permitting the plaintiff to testify to the statements of certain parties in relation to their efforts to procure employment for the plaintiff. The testimony objected to was, in substance, that, some time before the arrest and imprisonment complained of, the plaintiff had, at St. Paul, Minnesota, spoken to one Drake, a train-dispatcher, and one Smith, a railroad superintendent, to procure him employment, which they promised to do; and that on his return to St. Paul, after discharge from the imprisonment complained of, said Drake told him that he had had a situation for him at sixty dollars per month, but as he, plaintiff, was not there to take it, he, Drake, had to give it up. This testimony was objected to as hearsay, and as not within the issue, there being, as is claimed, no averment of special damage on account of the loss of this opportunity to obtain employment. It is doubtless the rule that such special damage can not be proved unless specially averred. The third paragraph, however, contains an averment that the plaintiff "was prevented from securing a good paying situation in Minnesota by means of

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said arrest," and while the averment is not specific, there having been no motion to have it made more specific, any pertinent and proper evidence of a loss of such situation was admissible under it. But the objection that the evidence offered was hearsay was well taken. The following extract from their brief shows all that counsel for the appellee have said in reference to this point, viz. : "This item of testimony was introduced for the purpose of proving a fact—that a situation worth sixty dollars per month to plaintiff was open for him, which he lost in consequence of his arrest by the defendants. The fact supported the allegation in the complaint, and for that purpose the fact was admissible, and was not subject to the objection that it was hearsay testimony, because the information of the fact was received from others. The objection that the evidence offered was not the best evidence of the fact, or the best way to make proof of the fact, was not made by the appellants, and, the evidence not being hearsay, there was no error in overruling the objection." We agree that the fact supported the allegation, and for that purpose the fact was admissible. But the objection goes not to the fact, but to the evidence offered in proof of it. The fact that a situation was open for him and was lost because of his enforced absence, like any other fact resting in parol, was provable by sworn testimony only, and Drake's statement to the plaintiff was no more admissible in evidence than the unsworn statement of any other person would have been. There are instances where verbal declarations are themselves the fact to be proven, being a part of the *res gestæ*, and provable as such. But not so here. The fact to be proved was that there had been a situation open to the plaintiff, not that Drake had said so, and his saying so was only hearsay, and not admissible as evidence of the fact.

As the judgment must be reversed on account of the error stated, it is not necessary that this opinion be extended to a consideration of other questions which counsel have dis-

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cussed. They are of minor importance and not deemed likely to arise on a second trial. Aided by the thorough study which they have evidently bestowed upon the case, counsel will be able to avoid the recurrence of the errors, if any there are, in the record, besides those which have been indicated.

The judgment of the circuit court is reversed, with costs, and the cause remanded, with instructions to grant the appellants a new trial.

 No. 7561.

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73	442
139	50
139	572

73	442
142	146
143	228

73	442
158	362

PRACTICE.—*Appeal to Supreme Court.—Assignment of Errors.*—The fact that the assignment of errors, on appeal to the Supreme Court, does not contain the names of all the parties, is not sufficient ground for the dismissal of the appeal, unless harm is shown to have been done the adverse party.

SAME.—The failure of the appellant to file a copy of his brief is not a sufficient cause for the dismissal of the appeal.

SAME.—*Supersedeas.*—A failure to file the transcript in the Supreme Court, within sixty days after filing the appeal bond, does not lose to the party his right of appeal, but upon such failure the bond ceases to operate as a supersedeas.

SAME.—The word “co-parties,” as used in section 551 of the code, means parties to the judgment appealed from, and not co-plaintiffs or co-defendants to the action.

MECHANIC’S LIEN.—*Implied Trust.*—Sult by A., a material man, against B. and wife and D., the purchaser of the property, and the contractor, to foreclose a mechanic’s lien for materials furnished the contractor in building a house on the real estate of B.’s wife. Among other things, it was found specially that a loan had been negotiated by B. of C., with which to build, and that a certain portion thereof remained in C.’s hands, and that the certificate for the same had been assigned to D., C. retaining the amount until the building for which the loan was negotiated was completed and discharged of all mechanics’ liens thereon.

Held, that, D. not having agreed to hold said certificate in trust, neither he nor his assignor is liable for the value thereof, and that no trust was created by implication of law in favor of A. upon the money in C.’s hands.

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From the Marion Superior Court.

V. Carter, for appellant.

E. A. Parker and *L. B. Swift*, for appellees.

MORRIS, C.—This suit was brought by George W. Hill, to recover judgment against John C. Moon and wife, J. M. Kirkwood and the appellant, and to foreclose a mechanic's lien.

The complaint states that Moon and wife, being the owners of lots 21 and 22, Bates' subdivision of lot 89, in the city of Indianapolis, Indiana, contracted with J. M. Kirkwood to erect and construct thereon a new brick dwelling-house; that Kirkwood purchased from said Hill building materials to be used in, and which were used in, the construction of said building, amounting to \$80; that the materials were not paid for, and that, within sixty days from the completion of said building, he filed a notice, in writing, of his intention to hold a mechanic's lien on said building and lot for said sum, in the office of the recorder of said county, which was duly recorded on the 24th day of October, 1876. A copy of the notice is made part of the complaint. Hill avers that said sum is due and unpaid, and that, after the completion of the building, the Moons sold and transferred said property to the appellant, who promised and agreed to pay said debt due Hill, and discharge his lien. He also says, that other defendants claim to have liens upon, or interests in, said property, but that, if they have any such liens or claims, they are junior and inferior to his. He files with his complaint a bill of particulars, and prays judgment and the foreclosure of his lien.

The appellees, some of whom subsequently became parties to the proceedings, answered in denial of Hill's complaint against the Moons, Kirkwood and the appellant. The several cross complaints, except as to parties and amounts, are substantially the same as that of Hill. All claim to hold mechanic's liens on said property, and demand foreclosures.

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It will not be necessary, in order to decide the questions raised, to notice them further.

Kirkwood, with whom the appellees severally contracted, was not a resident of the State, and during the progress of the cause, proceedings in attachment were commenced against him, through which the appellees realized \$500. These proceedings need not be further noticed.

The appellant answered the complaint and cross complaints in four paragraphs, the first being a general denial. As no question is raised upon the special paragraphs of the answer, they need not be further noticed.

Proper issues were formed and the cause submitted to the court for trial. The court, at the instance of the parties, found the facts and conclusions of law separately. The findings of the court, except so much thereof as relates to the attachment proceedings, are as follows :

“The court, being fully advised, finds as follows, to wit ;

“That there are due and owing from the defendant J. M. Kirkwood, to the several parties below mentioned, the sums set opposite their respective names, for work and materials performed and furnished for the brick building described in the complaint and cross complaints herein, and used in the construction thereof, to wit :

To George W. Hill the sum of	-	-	-	\$79.37
To John Scott	-	-	-	34.00
To William Pebrie	-	-	-	275.00
To Milton S. Huey and Jesse B. Johnson	-	-	-	320.00
To Cord H. Thees	-	-	-	287.50
To Fred. Gansberg	-	-	-	72.00
To Builders and Manufacturers' Association	-	-	-	13.28
Total	-	-	-	<u>\$1,081.63</u>

“The court further finds, that, prior to the erection of said brick building, the said John C. Moon procured a loan of the sum of \$2,500, through Joseph A. Moore & Brothers,

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of Indianapolis, to be used in payment for the erection and construction of said building; that said money, so loaned, was held by the said Moore Brothers, and paid over to the said John C. Moon as the work upon said building progressed, and that there is still in the hands of said Moore Brothers, belonging to said building fund, unexpended, the sum of \$646.46, for which sum the said Moore Brothers gave to the said John C. Moon a certificate, by which they agreed to pay the same when said building was completed and discharged from all mechanics' liens thereon.

“The court further finds that the contract for the erection and the construction of said brick building was made by the defendant James M. Kirkwood with the said defendant John C. Moon; that at the time said contract was made, and the labor and materials above mentioned were performed and furnished, said defendant Jennie C. Moon, the wife of John C. Moon, was the owner in fee-simple of said lots numbered 21 and 22, in Bates' subdivision of out-lot 89, in the city of Indianapolis, upon which said brick building is situate, and that said lots were the separate property of the said Jennie C. Moon, and that the said Jennie C. Moon did not contract with the said defendants and cross complainants, nor with the said plaintiff, or any or either of them, to perform labor upon or furnish materials for the said building, nor did she in any manner make the demands of said plaintiff and cross complainants liens or charges upon her separate property.

“The court further finds that, subsequent to the performance of the labor and furnishing of the materials, for which the plaintiff and cross complainants demand payment in this action, the defendants John C. Moon and Jennie C. Moon sold and conveyed by deed to the defendant Artemus N. Hadley and his wife said lots numbered 21 and 22, in Bates' subdivision of out-lot 89, in the city of Indianapolis, with the said brick building erected and standing thereon, who have, since their said purchase, completed the construc-

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tion of said building; that at the time of the purchase of said premises by the said defendant Hadley and his wife, the said Hadley had full knowledge of the demands of the plaintiff and of the cross complainants herein, for labor and materials performed upon and used in the erection of said building, and that the same were due and unpaid; that, in the deed of conveyance of said premises, executed by the said John C. Moon and Jennie C. Moon, his wife, to the said Hadley and wife, a provision was inserted that said deed was so executed and delivered, subject thereto, but that the said Hadley did not thereby, in terms, assume and agree to pay said claims, and that at the same time, and as a part of the same transaction, the said defendant John C. Moon endorsed without recourse, and delivered, to the said defendant Artemus N. Hadley, the above mentioned certificate for \$646.46, of the money borrowed, as above stated, through the Moore Brothers, to be used in the erection and construction of said brick building, and that said defendant Artemus N. Hadley now holds and still has said certificate in his possession, which said certificate is in these words. (Not on file.)

“And the court further finds that said labor was performed and said materials furnished by said plaintiff and cross complainants, as sub-contractors under said Kirkwood, and that no notice was given by them, or either of them, to the said John C. Moon and his wife of an intention to hold them personally liable for said labor and materials.

“The court finds as conclusions of law:

“*First.* That said plaintiff and cross complainants are not entitled to have their said claims for work and materials sustained and enforced as mechanic's liens upon said brick building and lots upon which the same is now situated.

“*Second.* That said plaintiff and cross complainants are not entitled to a personal judgment against the defendants James M. Kirkwood, John C. Moon and Jennie C. Moon, or either of them.

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“*Third.* That the balance of the said building fund, remaining unexpended in the hands of the Moore Brothers, for which said defendant Artemus N. Hadley now holds the certificate, should, in justice and equity, be applied to the payment of said claims of the plaintiff and cross complainants, for labor performed and materials furnished in the erection and construction of said brick building, and that said defendant Artemus N. Hadley received said certificate, and now holds the same, in trust for the said plaintiff and cross complainants.”

To these conclusions of law the appellant, at the proper time, excepted. The appellant moved the court to strike out of the special finding of facts so much thereof as related to the loan of \$2,500 through the Moore Brothers, and to the certificate for \$646.46, and its assignment to the appellant, which motion the court overruled, and the appellant excepted. The appellant then filed a motion for a new trial, which was also overruled, and he excepted.

The court then rendered judgment against the Franklin Insurance Company, garnished in the attachment proceedings, in favor of the plaintiff below and cross complainants, for \$500. The court also ordered and decreed that said Hill and cross complainants recover of the defendant Hadley said certificate for \$646.46, money in the hands of Moore Brothers, found to be in his possession, for their use. The court appointed the appellee Hill a trustee to receive said certificate and collect the money due thereon, and directed him, in case the said Hadley refused to surrender it, to institute suit therefor, and apply any proceeds obtained to the payment of his and said cross complainants' claims, *pro rata*. To the rendition of this decree and order, the appellant objected and excepted. The cause was taken by appeal to the general term of said court. The errors assigned were:

1st. That the court in special term erred in overruling

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the appellant's motion to strike out portions of the special findings of fact ;

2d. The court erred in rendering judgment against the appellant for the possession of the certificate mentioned in the special findings ;

3d. The court erred in its conclusions of law.

The judgment and decree of the court in special term were affirmed by the court in general term. The cause was appealed to this court, and it is here assigned for error : That the superior court in general term erred in affirming the judgment of the court in special term. The appellee has made a motion to dismiss the appeal for the following reasons :

1st. Because the assignment of error does not contain the names of all the parties ;

2d. Because no proof of notice of appeal to co-parties has been filed with the clerk ;

3d. Because the appellant failed to file a copy of his brief ;

4th. Because the transcript was not filed in this court within sixty days from the rendition of judgment and the time allowed for filing an appeal bond.

The first and third grounds for dismissal are formal and technical, and as no harm appears to have resulted from the failure to comply with the rules in this respect, we think the appeal should not, for these reasons, be dismissed. It is said by a former member of the Supreme Court, that, from its organization, it has been the rule that the assignment of errors must contain the names of all the parties, but that it has been rarely regarded. *Buskirk's Practice*, 121.

By failing to file the transcript in this court within sixty days after filing the appeal bond, the appellant lost the benefit of his bond. Upon such failure it ceased to operate as a supersedeas. *Ham v. Greve*, 41 Ind. 531. But he did not, by such failure, lose his right of appeal.

The word "co-parties," as used in section 551 of the code,

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means parties to the judgment appealed from, not co-plaintiffs or co-defendants to the action. The appellant's co-defendants to the action were adverse to him, and not co-parties with him or to the judgment rendered against him, within the meaning of the law. The motion to dismiss the appeal is therefore overruled.

We proceed to consider the other questions in the record. The court held that, by the law arising upon the facts found, the appellant received said certificate for \$646.46, the balance found to be in the hands of the Moore Brothers, and called the building fund, and that he now holds the same, in trust for the appellees. No contract or agreement is found to have been made between the appellant and the appellees, or any of them, in relation to the building, the so called building fund or the certificate. Nor is it found that the appellees had, by any contract or agreement with any one, any interest in the money which was found to be in the hands of the Moore Brothers. For aught that appears in the finding of facts, the appellees and the Moore Brothers were strangers, unknown to each other. Nor is it found that the appellees, or any of them, made any contract with John C. Moon in relation to the materials furnished or labor performed, the money in the hands of the Moore Brothers, or the certificate held and assigned by him to the appellants, but it is expressly found, as a matter of fact, that the materials were furnished, and the labor performed, by the appellees respectively, as sub-contractors with James M. Kirkwood, who contracted with John C. Moon to erect said building. It is found that the appellants knew of the claims of the appellees, and that they were unpaid, but it is not found that Moon was indebted to Kirkwood on the contract for the erection of said building. For aught that appears in the finding, he may have paid Kirkwood in full. It is also found, as matter of law, that the appellees were not entitled to judgment against Moon. It is found that John C. Moon.

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effected a loan through the Moore Brothers ; that the money was paid by them to Moon as the building progressed ; that the certificate assigned to the appellant was for a balance of the \$2,500 in the hands of the Moore Brothers, payable upon the completion of said building ; but it is also found that the appellant completed the building, and matured the certificate.

Upon these facts the first inquiry would seem to be, when and how, if at all, was a trust in favor of the appellees impressed upon this money in the hands of the Moore Brothers? It will be difficult, we think, if not impossible, to discover in the special findings any fact having the least tendency to impress a trust upon this money, while in the hands of the Moore Brothers, in favor of the appellees. The Moores sustained no relations to any of the parties, save John C. Moon. They did not know the appellees, nor are they found to have had any interest in the building or the lots on which it was erected. How they were interested in Moon or the erection of the building, if they were so interested, is not found. They paid the money to Moon, from time to time. Upon what terms or conditions they held the money for Moon can not be determined from the facts found. The loan was made to Moon through the Moores ; they held it for him, and when they paid it to him it was his. They did not hold it in trust for the appellees. When the money was paid to John C. Moon, it was his absolutely. He did not owe the appellees. They had no claim which they could enforce against him. Had he held the money or the certificate at the time of the trial, the appellees could have reached neither, for, by the finding of the court, he owed them nothing. If, then, any trust attached to the certificate in the hands of the appellant, it must have arisen out of the circumstances of its assignment to him by Moon.

The court finds that said lots and the building thereon were sold and conveyed by John C. and Jennie C. Moon to

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the appellant and wife ; that a provision was inserted in the deed to the effect that it was to be subject to the claims of the appellees, but that he did not thereby, in terms, assume and agree to pay them. But the court also found that the appellees had no claim upon the building and lots. It could not, we think, be legally or logically inferred, from such a provision in the deed, that its object and purpose were to subject the premises conveyed, or the grantee, to the payment of claims in no way connected with, or constituting liens upon, the premises.

The court also finds that said certificate for \$646.46, part of the \$2,500.00 borrowed through the Moore Brothers, to be used in the erection of said building, was assigned, by endorsement without recourse, to the appellant, by John C. Moon, at the time the lots were sold and conveyed to him, and as a part of the same transaction ; that he still has it in his possession. It is not found that, by the terms of the assignment, he agreed to receive and hold the certificate in trust for the appellees ; nor is it found that any agreement was made between them other than that contained in the assignment, upon the subject. Nor will the law, upon the facts found, by implication raise such a trust in favor of parties, to whom neither Moon nor the appellant was liable. The question is to be considered as though the mechanic's lien law had never been enacted. And, so considered, it seems clear to us, that the certificate in the hands of the appellant was subject to no trust in favor of the appellees.

We conclude, therefore, that the court below erred in its conclusion of law, that the appellant held said certificate in trust for the appellees.

The judgment and decree in favor of the appellees, and against the appellant, for the recovery of said certificate, and appointing Hill a trustee to receive the same, and, in case it is not surrendered, to institute suit against appellant therefor, ought to be reversed.

Bunnell v. Hay *et al.*

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment and decree below in favor of the appellees, and against the appellant, for the recovery of said certificate, and appointing the appellee Hill a trustee to receive the same, and directing him, if it is not surrendered, to sue the appellant therefor, be, and the same is, in all things, reversed, at the costs of appellees, and the cause is remanded for further proceedings in accordance with this opinion.

No. 7793.

BUNNELL v. HAY ET AL.

EXEMPTION LAW.—*Resident Householder.*—A judgment debtor, after the death of his wife, employed a family to keep house for him and his adopted daughter, who was dependent on him for support. During the daughter's visit to her natural mother, an execution was levied upon his property which he claimed as exempt therefrom.

Held, that he was a resident householder, and entitled to the exemption.

SAME.—*Householder.*—A householder is one upon whom rests the duty of supporting the members of his family or household.

From the White Circuit Court.

T. N. Bunnell, for appellant.

ELLIOTT, J.—Thomas A. Bunnell, the appellant, was the owner of the personal property involved in this controversy. He became a resident of White county, Indiana, in December, 1877, and continuously there resided until the trial of this action in the court below. His family, at the time he became a resident of said county, consisted of his wife and an adopted child. In March, 1878, appellant's wife died. Thereafter appellant employed a family to keep house for him, he providing the house, the greater part of the furniture, and nearly all the fuel, and paying the persons who kept house for him, in addition, the sum of \$1³⁰/₁₀₀ per week.

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The person, or persons, who kept house for him, supplied the food, cared for appellant's room, and did his washing. An execution was issued against appellant on the 26th day of November, 1878, and, on the 6th day of December, of the same year, was levied on the personal property in controversy. At the time the levy was made, the child was living with appellant, but, at the time of the trial, was on a visit to its natural mother. Prior to the levy of the execution, appellant claimed his right to hold the property as exempt from execution, and executed and tendered the proper schedule. The value of the property is less than three hundred dollars.

The question is: Was the appellant a resident householder and, entitled to have the property in controversy exempt from levy and sale upon execution? As we gather from the record and the brief of appellant—there is none from the appellees—the claim of appellant to hold the property as exempt from execution was denied, upon the ground that he was not a resident householder within the meaning of the law. The conclusion of the court below was erroneous. The appellant, during the life of his wife, was, beyond all possibility of respectable controversy, a resident householder, and the death of his wife did not deprive him of that character, nor of the legal rights belonging to it. No one, we think we dare say, would seriously contend that a man ceased to be a householder the instant his wife died, and yet, if her death determines his right to be considered a householder, that effect attached without an instant's delay. The child, although an adopted one, was dependent upon appellant for support; the appellant's home was that of the child, and the absence of the latter on a visit to its natural mother did not change its domicile. *Griffin v. Sutherland*, 14 Barb. 456; *Wade v. Jones*, 20 Mo. 75; *Norman v. Bellman*, 16 Ind. 156. It was the duty of the appellant to support the child which was his by adoption, and the case, therefore, falls within the rule, sanctioned by many authorities, that he

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is to be deemed a householder upon whom rests the duty of supporting the members of his family or household. Thompson Homesteads and Exemptions, secs. 45-46; Smyth Homestead and Exemptions, sec. 532.

The fact that the appellant secured the services of others to prepare and furnish food, and to take care of his furniture and rooms, did not take from him the character of householder. The employment of the persons for the purpose mentioned was not, in effect, different from the hiring of servants and paying them daily or weekly wages. In *Graham v. Crockett*, 18 Ind. 119, it was held, where a man and his sister lived together, both owning some personal property, and contributing toward their household expenses, and the brother appeared to direct affairs, that he was a resident householder within the meaning of the act exempting property from seizure upon execution. In *Brown v. Stratton*, 8 Central L. J. 46, Brown leased the premises, retaining one room, the tenant furnishing and preparing food, and it was held that Brown was to be regarded as a householder. In many cases, it has been held that a widower is to be regarded as a householder, although all his children may have arrived at full age and have left his domicile, leaving him, so far as wife, children or kinsmen are concerned, living alone. *Kimbel v. Willis*, 12 Cent. L. J. 211; *Silloway v. Brown*, 12 Allen, 30; *Whalen v. Cadman*, 11 Iowa, 226; *Myers v. Ford*, 22 Wis. 139; *Barney v. Leeds*, 51 N. H. 253; *Blackwell v. Broughton*, 56 Ga. 390.

Judgment reversed, at the costs of the appellees.

No. 7602.

SMITH v. WELDON ET AL.

HIGHWAY.—*Petition.*—*Description.*—A petition to locate a highway must describe the highway with sufficient certainty to enable a practical

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surveyor to run it, and, therefore, the description in such a petition, "thence north-west fourteen rods, with an angle of about ten degrees," is void.

SAME.—Uncertainty in Description.—The description of a highway embraces its beginning, course and termination. If in any of these particulars it is so uncertain that a practical surveyor can not locate it, the entire road fails; and any person through whose land the road will pass may show such defect, whether it occurs in that part of the road on his land or not.

SAME.—Injunction.—When Granted.—An injunction will not be granted unless the plaintiff shows that the threatened injury would be irreparable, or would produce great injury to him, and that he is equitably entitled thereto, and has no adequate remedy at law.

SAME.—Pleading.—Complaint.—In an action to enjoin the opening of a highway, a transcript of the proceedings before the county board locating the same, filed with the complaint, constitutes no part thereof.

From the Gibson Circuit Court.

W. M. Land and *J. B. Gamble*, for appellant.

J. E. McCullough and *L. C. Embree*, for appellees.

BICKNELL, C.—This was a suit for an injunction against the district supervisor and the township trustee, to prevent the opening of a highway, established by the county board, upon a petition, under the statute of highways. A demurrer to the complaint, for want of sufficient cause of action, was overruled; the defendants answered in denial; the issue was tried by a jury, who returned a verdict for the defendants; the plaintiff moved for a new trial; his motion was overruled; judgment was rendered upon the verdict, and the plaintiff appealed to this court. The only errors assigned and argued by the appellant are:

1st. That the verdict is contrary to law.

2d. That the verdict is not sustained by sufficient evidence.

3d. That the court erred in giving to the jury special instructions, asked for by the appellees, and numbered 1 and 2.

A cross error was assigned by the appellees, as follows:

That the court erred in overruling the demurrer to the complaint.

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The material averments of the complaint are, that the appellees are threatening to open said highway through the appellant's timbered land, for a distance of 94 rods, and that such opening "will necessarily destroy growing and valuable timber of the appellant, to his irreparable injury and damage, to the sum and value of \$100 ;" and that the petition for said highway, a copy of which is filed with the complaint, and the order of the county board upon said petition, are illegal and void, for uncertainty in the description of the beginning, course and termination of said highway. Wherefore the complaint prays that the defendants may be enjoined against opening said pretended road, etc.

The description alleged to be insufficient is in the petition, and in the order of the county board, as follows: "Commencing in the Owensville and New Harmony road, fifteen rods south of the quarter-section line, in section No. 25 of township No. 3 south, of range No. 12 west, running west about one hundred and twenty-seven rods, upon the lands of Manoah Smith and Mary E. Weldon, thence north-west fourteen rods, with an angle of about ten degrees." A petition to locate a highway must describe the highway with sufficient certainty to enable a practical surveyor to run it. *McDonald v. Wilson*, 59 Ind. 54.

Under this rule, the foregoing description is clearly bad in that part of it which gives the course, "thence north-west fourteen rods, with an angle of about ten degrees." No man could run that line, because it is impossible to determine whether the description means ten degrees west of a due north-west line, or ten degrees east of a due north-west line, or ten degrees north of a due west line. This fault in the description is fatal. *DeLong v. Schimmel*, 58 Ind. 64; *Farmer v. Pauley*, 50 Ind. 583.

But, notwithstanding this fault in the description, the plaintiff was not entitled to an injunction, without showing that the threatened injury was irreparable, or, in the language of

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our statute, "would produce great injury to the plaintiff." Our courts have always held that a mere trespass, easily capable of compensation in damages, is not a proper subject of injunction. *The Indianapolis, etc., Co. v. The City of Indianapolis*, 29 Ind. 245; *Lewis v. Rough*, 26 Ind. 398; *McQuarrie v. Hildebrand*, 23 Ind. 122; *Bolster v. Catterlin*, 10 Ind. 117; *The City of Columbus v. Storey*, 33 Ind. 195.

The averment in the complaint, as to the extent of the injury, is a peculiar one. It is substantially "that the plaintiff will sustain irreparable injury, to the extent of \$100;" and the plaintiff testified on the trial as follows: "The timber is mostly oak, poplar and hickory; the damages would be over \$100; it would damage my land \$100 to have the timber cut off the line of the road, besides injuring other timber falling against it."

In the case of *Thatcher v. Humble*, 67 Ind. 444, an injunction was sustained because, in the opinion of the court, under the circumstances of that case, there was no adequate remedy at law. But the evidence in the present case brings the claim fairly within the principles asserted in *Lewis v. Rough*, and in *The City of Columbus v. Storey*, *supra*.

Again, it appeared in evidence that the appellant was one of the petitioners; his name headed the list. He thereby adopted the description in the petition, and upon it he procured the order which he now claims was illegal. In the case of *Wallace v. McVey*, 6 Ind. 300, the court say: "An injunction is the strong arm of the Court, and should never be resorted to but upon necessity," and "should never be allowed, in the first instance, except upon a case clearly made, showing an equitable right to the interference of the Court." We think this was no case for an injunction; that the verdict was fully sustained by the evidence, and was not contrary to law.

Instructions Nos. 1 and 2, asked for by the appellees and given by the court, were as follows:

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“No. 1. If the jury find that the description of the highway in controversy is certain as to that portion of it which runs through and over the lands of the plaintiff in this case, then it is their duty to find for the defendants.

“No. 2. Before the plaintiff in this case is entitled to a verdict at your hands, he must show, by a preponderance of the evidence, that some portion of the highway in controversy that runs over his land is uncertain, and, although the plaintiff might show that other portions of said highway are vague and uncertain, yet this would not be sufficient to entitle him to a verdict at your hands.”

These instructions were erroneous. The description of a highway embraces its beginning, course and termination. If in any of these particulars it is so uncertain that a practical surveyor can not place it, the entire road fails; any person through whose land the road will pass may show that the statute has not been complied with in reference to some part of the road, whether he owns that part of the land or not. But these errors in the instructions can not avail the appellant, because he had no equitable right to an injunction, and because the verdict for the appellees was right upon the evidence, and according to law.

We think the court erred in overruling the demurrer to the complaint; the defective petition, not being set out in the body of the complaint, was not a part of the complaint. See *Parsons v. Milford*, 67 Ind. 489, and cases there cited. No cause was shown for the extraordinary remedy of an injunction. The judgment ought to be affirmed, with costs.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and is hereby, affirmed in all things, at the costs of the appellant.

Hill v. Shalter.

No. 7631.

HILL v. SHALTER.

PROMISSORY NOTE.—Assignment.—Pleading.—Complaint.—Demurrer.—**Defect of Parties.**—In an action on a promissory note, by an assignee against the maker, the complaint alleged that such “note was endorsed and assigned by the payee to plaintiff.”*Held*, that such allegation was equivalent to the allegation that the note was assigned by endorsement thereon in writing, and the complaint, in that respect, was sufficient on demurrer for want of facts.*Held*, also, that, if the assignment was not in accordance with the statute, the demurrer should have been for defect of parties.

From the Tipton Circuit Court.

J. W. Robinson, for appellant.*R. B. Beauchamp* and *G. H. Gifford*, for appellee.

MORRIS, C.—This suit is upon a promissory note. The complaint alleges that on the 1st day of April, 1878, the appellant executed a note payable to the order of Mayo & Shalter, for \$289.34, at the Citizens National Bank, Indianapolis; that the payee endorsed and assigned the note to the appellee. The appellant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The court below overruled the demurrer, and the appellant excepted. The ruling upon the demurrer is assigned for error.

The only objection urged to the complaint is, that it does not show that the note was transferred in writing, as required by the statute. The averment in the complaint is, that said “note was endorsed and assigned by the payee to plaintiff.” This averment is equivalent to an allegation that the note was assigned by endorsement thereon in writing, and clearly sufficient. The word “endorsed,” as used, means a writing on the back of the note. *Cooper v. Drouillard*, 5 Blackf. 152. But, if the assignment was not in accordance with the statute, the demurrer, to be available, should, for cause, have stated a defect of parties. *Reed v. Garr*, 59 Ind. 299.

The City of Huntington v. Mendenhall.

We think it sufficiently appears from the record that the note was filed with and as a part of the complaint. The judgment ought to be affirmed.

PER CURIAM.—It is ordered that the judgment below, upon the foregoing opinion, be, and the same is hereby, affirmed in all things, at the costs of the appellant.

No. 7617.

THE CITY OF HUNTINGTON v. MENDENHALL.

PLEADING.—*Certainty.—Waiver.*—A mere want of certainty in a complaint is waived by a general denial. Such complaint, unobjected to, is good after verdict.

TRIAL.—*Variance.—Proof.*—When a variance between the allegations of the complaint and the proof misleads no one, it will be regarded as immaterial.

SAME.—If the evidence shows a wholly different state of facts from that alleged in the complaint, the variance is fatal, and the action can not be maintained.

NEW TRIAL.—*Evidence.—Practice.*—A cause for a new trial on account of the admission of alleged improper testimony will not be considered by the Supreme Court, unless such testimony appears in the record.

SAME.—*Records of City Council.*—In a suit against a city for injuries sustained by failing to keep in repair a highway or street, it is competent to put in evidence the records of the common council, to show that the street or highway is under the control of said city.

SAME.—*Harmless Error.*—A harmless error in admitting evidence will not warrant the granting of a new trial.

From the Huntington Circuit Court.

B. F. Ibach, for appellant.

BICKNELL, C.—This was an action by the appellee against the appellant, to recover damages for an injury sustained by failure to keep in repair the Fort Recovery road within the limits of the city of Huntington.

73	460
135	49
136	695

73	400
171	481

The City of Huntington v. Mendenhall.

There was an answer in denial of the amended complaint, a trial by jury and a verdict against the appellant; a motion for a new trial was overruled; judgment was rendered on the verdict for thirty dollars and costs; and this appeal was taken.

Errors were assigned by the appellant as follows:

1. The court erred in overruling the demurrer to the complaint;
2. The court erred in overruling the motion for a new trial;
3. The complaint does not state facts sufficient to constitute a cause of action

The first of these errors is not mentioned in the appellant's brief, and the record does not show that a demurrer to the complaint was overruled. As to the third error assigned, the complaint states, in substance, that the appellant had the possession, care and control of the Fort Recovery State Road within the limits of the city, and was bound to keep it in reasonable repair, but neglected and refused to repair it for six months, by reason whereof the road became dangerous, and the appellee, without any fault on his part was thrown out of his wagon and sustained the injuries complained of.

If these allegations were not sufficiently specific, the proper remedy was a motion to make more specific; a mere want of certainty is waived by the general denial. *Fillson v. Scott*, 15 Ind. 187; *Fultz v. Wycoff*, 25 Ind. 321. Such a complaint, unobjected to, is good after verdict.

As to the second error assigned, the reasons for a new trial are as follows:

First. The verdict is not sustained by sufficient evidence.

Second. "Error of the court in permitting the appellee to testify in his own behalf as follows. 'The place where I fell off, and from which my injuries followed, was in front of Mrs. Detro's gate, and is not the time I fell off of the load of wood. I fell off of the load of wood some time after

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this ; the time I was hurt there was no wood in the wagon ; the wagon was empty ; the falling off of the wood was at another time, and at another place.' And in permitting John Roche, a witness for the appellee, to testify as follows : 'I was on a committee to run the South line, and the line as shown by the commissioners' record is not the line we established ; we did run at a right angle south when we came to the Bluffton road, but we ran along the Bluffton road.' And in allowing said Roche to testify where a resolution of the common council made the city line, and where he said Mrs. Detro's house and land was in the city. And in allowing the appellee to put in evidence the following resolution of the common council and the records of said council.' And in permitting A. W. De Long to testify that Messrs. Buchanan and Bryant said to him that he could not commence at Mrs. Purviance's corner, which was nearer the city than the place of the accident.'"

3. That the verdict is contrary to law.

As to the first reason for a new trial, the complaint alleges an injury on the Fort Recovery road within the limits of the city of Huntington, and that the appellee was thrown from a wagon loaded with wood, which wagon and wood fell upon him and crushed and bruised him, making him a cripple for life.

But the injury offered in evidence occurred on the road going south from the city of Huntington, at a place opposite Mrs. Detro's gate ; the appellee testified : "The road on which I got hurt is called the Bluffton road, and about one hundred yards from the north end of the gravel road ; when at Mrs. Detro's gate I was thrown off the wagon."

Another witness testified : "I was president of the Kelso gravel road, known as the Bluffton road."

The Fort Recovery road is not mentioned in the testimony, but this variance between the complaint and the proof

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seems to have misled nobody, and may be regarded as immaterial under section 94 of the practice act.

All the evidence shows that the injury sustained opposite Mrs. Detro's gate was not the injury stated in the complaint. The complaint describes the injury as caused by the appellee being thrown from his loaded wagon, which, with the load, fell upon him; the evidence is, that at Detro's gate the appellee fell from John Weston's empty wagon, and that no wagon or wood fell upon him there. John Weston swears, "when right by Mrs. Detro's gate, * * * when the hind wheel came up, it chucked down into the hole and Mendenhall fell out. * * * He got up and climbed into the wagon himself, and did not appear to be hurt; he said he did not think he was hurt, but complained of his head and back of his neck; there was no load on the wagon."

It appeared that, about two weeks after this fall, on the same road, but at a place further south, and further from the city, the appellee, while coming to town with a load of wood in his own wagon, fell from it, and was then badly hurt by the wagon and wood falling upon him.

David Mendenhall, son of the appellee, testified: "In about a couple of weeks after father got hurt the first time, he was coming to town with a load of wood, when the wagon was upset and the wood was thrown over on him; this time he was badly hurt; he was badly hurt at the second fall, at a place further south than where he was hurt the first time."

If both these injuries were received within the city limits, the appellant had distinct causes of action for them, and, in a suit upon one, ought not to recover for the other. The complaint states the cause of action as arising on the second injury, but the evidence was confined to the first. The whole effort was to show that the road opposite Mrs. Detro's gate was within the limits of the city. The other injury was further south, but its precise place, in reference to the city limits, was not shown.

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The plaintiff having stated his case in the complaint as follows: "The plaintiff was thrown from his wagon, with great force and violence, into the gutter on the side of the road, and the wagon, being then and there loaded with cordwood, fell upon the said plaintiff, and crushed, bruised and lacerated him," etc., his proofs ought to be confined to that case, and, if he proves a different case, he ought to fail. *McAroy v. Wright*, 25 Ind. 22.

We think this case is not within the provisions of sections 94 and 95 of the practice act, but is governed by section 96 of that act, the allegations of the claim being unproved "in their general scope and meaning." See *Boardman v. Griffin*, 52 Ind. 101. The verdict was not sustained by sufficient evidence; there was a failure of proof; there was error, therefore, in overruling the motion for a new trial.

So much of the second reason alleged for a new trial as concerns the alleged admission of improper testimony by the appellee, need not be considered, because the testimony thus alleged to have been admitted is not in the record.

As to so much of the second reason alleged for a new trial as concerns the admission of alleged improper testimony by John Roche, we think there was no error in that respect. Where a certain line was actually run, and whether it included Mrs. Detro's house and land, are questions which may be properly answered by any one who knows the facts.

As to so much of the second reason for a new trial as claims error in admitting the resolution and records of the common council, we find no error in that ruling. It was competent to put these matters in evidence as links in the chain of proof tending to show that the place in controversy had been brought within the city limits.

As to so much of the second reason for a new trial as alleges error in permitting A. W. DeLong to testify that Messrs. Buchanan and Bryant told him that the gravel road company could not commence at Mrs. Purviance's corner, we think

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that testimony was immaterial and irrelevant; but such an error alone would not warrant the reversal of the judgment. The testimony amounted to nothing, and the error was a harmless one.

The judgment ought to be reversed, and the cause remanded for a new trial.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and is hereby, in all things reversed, at the costs of the appellee, and this cause is remanded for a new trial.

No. 7548.

HANNAH ET UX. v. DORRELL.

JUDGMENT.—*Foreclosure of Mortgage.*—*Divisibility of Premises.*—*Erroneous Judgment.*—*Correction of, on Motion at Subsequent Term.*—*Appeal.*—Where, in a suit to foreclose a mortgage, the court rendered judgment showing that there were instalments of the mortgage debt yet to become due, but failed to find whether or not the mortgaged property was susceptible of division, the court could correct such omission, on motion, at a subsequent term. But the court could not, upon such motion, review its former finding and judgment as to any question of fact decided. Relief from such error could only be had by appeal.

SAME.—*New Trial.*—After the term at which a judgment is rendered, a new trial can be had only on complaint, and for causes discovered after the term.

BILL OF EXCEPTIONS.—*Amendment in Court Below.*—Where a bill of exceptions is prepared and filed in vacation by the appellant, the adverse party may move, in the trial court, for the correction of omissions and inaccuracies in the bill by proper amendment.

From the Ohio Circuit Court.

J. B. Coles, for appellants.

A. C. Downey and H. S. Downey, for appellee.

NEWCOMB, C.—This was, originally, an action to foreclose a mortgage on real estate, given by the appellants to one Daniel Dorrell, who assigned the same, with the mortgage

73	465
130	330
130	429
73	465
154	874

Hannah et ux. v. Dorrell.

notes, to the appellee. The notes were eleven in number, running from one to eleven years, and but one of them was due. They were given for the purchase-money of the land mortgaged. At the time of the sale and conveyance of the land to Milton Hannah, there were two mortgages upon it, one to the State of Indiana, for the benefit of the school fund, which figures in the subsequent proceedings as "the school fund mortgage." This incumbrance amounted to \$400. The other mortgage was owing to Mary Scranton, who was made a defendant in the action, and, on her cross complaint, her mortgage was foreclosed.

Hannah and wife filed a cross complaint, in which they alleged that Daniel Dorrell conveyed the lands in question to Milton Hannah, the maker of the notes, with full covenants of warranty, and agreed and promised to pay off the incumbrances thereon. Also, that when Daniel Dorrell assigned the notes to the plaintiff, the latter promised him, in writing, to pay said incumbrances; that the \$400 mortgage to the State was due; that Mary Scranton had filed her cross complaint, praying the foreclosure of her mortgage, and that Daniel Dorrell was insolvent. Prayer, that all said incumbrances be taken into consideration; that, when said lands should be sold, the proceeds should be applied, first, to the payment of the mortgage to the State, secondly, to all other liens, in the order of their priority; that, for the payment of such prior liens, Milton Hannah might receive a credit and set-off against his note and mortgage; that the notes first maturing, to the amount of said payments, be declared paid and satisfied, and that he be relieved from further payment until the remainder, or a part of his subsequent notes, should become due. A copy of the agreement between William and Daniel Dorrell was filed with the cross complaint. It provided that William should pay the Scranton mortgage, and some other incumbrances, but was silent as to the school fund mortgage.

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After unsuccessfully demurring to this cross complaint, the appellee answered it by a general denial. The issues were submitted to the court for trial. There was a finding for the plaintiff, showing that there was then due on the notes and mortgage of Milton Hannah \$223, and that further sums would become due on the first day of March of each year, to and including the year 1887. The court also found that the mortgage of Mary Scranton was a prior lien, amounting to \$643.33; that the \$400 school fund mortgage was also a lien on the mortgaged premises, which incumbrances the plaintiff, as assignee of Daniel Dorrell, was, "by his agreement introduced in evidence, to assume and pay."

The portion of the decree defining the rights and obligations of the parties, touching said incumbrances, was as follows: "It is therefore ordered and adjudged by the court, that, if the plaintiff, William Dorrell, shall pay and discharge said liens, according to the terms of said agreement, then he shall have his order of sale against said lands for the several amounts heretofore found in his favor, as each shall become due; but if said plaintiff, Dorrell, shall fail to pay and remove said incumbrances, then, if the defendant Hannah shall pay the same, or if the lands shall be holden therefor, the said amounts are declared a credit on the notes and mortgage, sued on by said plaintiff, Dorrell, in favor of said Hannah, and said plaintiff, Dorrell, shall not have his execution or order of sale herein until said liens shall be paid off by him, or until a sufficient number of the notes of said Hannah shall have matured to equal the said sum of six hundred and forty-eight and $\frac{3}{4}$ dollars, due said Mary Scranton, and said sum of four hundred dollars, due the State of Indiana, with the interest thereon to the time of their satisfaction."

The decree was silent as to the divisibility or non-divisibility of the mortgaged premises.

There was no motion for a new trial, no objection by either party to the decree, nor any motion to modify it.

Hannah et ux. v. Dorrell.

At the next succeeding term of the court, the plaintiff presented a written motion, stating, among other things, that the court in its decree omitted to find and enter of record whether the mortgaged premises were or were not susceptible of division; and that the court, "by inadvertence and mistake," ordered that the \$400 mortgage to the school fund should be deducted from the amount due the plaintiff on the notes held by him, when in fact said Hannah, by his contract in the purchase of said lands, agreed to pay the same, in addition to the notes held by plaintiff. The prayer of the motion was that the omission named be supplied; that the plaintiff might receive the whole amount due him, without any deduction on account of the mortgage to the school fund, and that the decree be so modified that it could be collected and enforced by plaintiff. The original defendants appeared to the motion, and Milton Hannah moved to strike out so much of plaintiff's motion as applied to the previous finding of the court touching the school fund mortgage. This motion was overruled, and he excepted.

The court then heard oral evidence as to the divisibility of the land, and also concerning the contract between Daniel Dorrell and Hannah, at the time the latter purchased the land, to the effect that Hannah was to pay the school fund mortgage, and that the amount thereof was deducted from the purchase-money.

To the introduction of the evidence relative to said contract the defendants objected, on the ground that that issue had been tried and determined at the previous term, and that judgment had been rendered in accordance with the finding. This objection was overruled and the defendants excepted.

The court then found and adjudged that the mortgaged premises could not be sold in parcels without injury to the interests of the parties, and modified its former decree as prayed for in the plaintiff's motion.

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Was it competent for the court on motion to so change its judgment rendered at a former term? The power of courts to amend their records at a term subsequent was discussed and settled in *Makepeace v. Lukens*, 27 Ind. 435, and in *Uland v. Carter*, 34 Ind. 344; *Miller v. Royce*, 60 Ind. 189; *Schoonover v. Reed*, 65 Ind. 313; *Reily v. Burton*, 71 Ind. 118. The rule announced in these cases, and in the authorities on which it is based, is thus stated in *Uland v. Carter*: "Amendments are allowed only when the case is within the reach of some statute, or where there is something to amend by, that is, where there is some memorial paper, or other minute of the transaction in the case, from which what actually took place in the prior proceeding can be clearly ascertained and known." The court below was clearly authorized by statute to entertain the motion and hear evidence as to the divisibility of the land mortgaged. The prior judgment showed that there were instalments of the mortgage debt thereafter to become due. In such cases section 638 of the code requires the court, "after final judgment," to "ascertain whether the property can be sold in parcels," etc. This duty was omitted at the term at which judgment was rendered. Perhaps, under this section, the court could properly have inquired into and determined that question at a subsequent term; but, however that may be, it undoubtedly had such power under section 99, which requires courts to supply an omission in any proceedings, on complaint or motion filed within two years.

But we think the court below erred in its action on the other branch of the motion. A case was not shown of an erroneous entry of what the court in fact found and adjudged at a previous term, but the motion sought to correct an "inadvertence and mistake" of the court in finding a fact against the evidence in the case. In this respect the motion was made to perform the office of a writ of error. The argument of the appellee in support of this proceeding is,

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that it was shown by the decree that the finding and judgment that the school fund mortgage ought to be charged, in the first instance, upon the land, rather than upon Hannah, was based upon the agreement between William and Daniel Dorrell, filed with Hannah's cross complaint, and that the agreement did not so provide. If this be granted it still follows that the motion called upon the court to review its former finding and judgment upon the evidence adduced at the hearing, and to re-examine the question whether the school fund mortgage, as between the parties litigant, should have precedence over the plaintiff's mortgage. And the court, instead of proceeding to review its former action by the record it had made, heard oral evidence as to the terms of the original contract between Hannah and Daniel Dorrell. In this way the motion was made to perform the function of a motion for a new trial, and that as to a part only of the cause.

It is urged, however, that the oral evidence was harmless, because the decree itself disclosed that it was founded on a misconception of the contract pleaded in Hannah's cross complaint. But we can not say that the evidence so heard on the motion did not influence the court to change its decree. Before hearing this evidence it had decided one way, and after hearing it a different decision was rendered. We may remark further that the contract so pleaded is not identified as the contract referred to in the decree. That speaks of an agreement "introduced in evidence," but does not refer to it as the contract set out in the cross complaint. Besides, the evidence on which the original judgment was founded was not properly a part of the record, and it is doubtful whether it should be considered. *Davis v. Franklin*, 25 Ind. 407.

After the term at which judgment is rendered, a new trial can be had only on a complaint, and for causes discovered after the term. 2 R. S. 1876, p. 183. The motion we have

Hannah et ux. v. Dorrell.

considered, and the action of the court thereon, can not be sustained by section 99 of the code, as that provides only for relief from a judgment taken against the party through *his* mistake, inadvertence, surprise, or excusable neglect. It does not cover the case of a mistaken decision by the court. For errors of the court the law has provided other remedies. The motion does not disclose a case of mistake, surprise, or excusable neglect on the part of the plaintiff below. He made no objection to the decree when it was rendered, and he has failed to show that every fact in the case, as presented by his subsequent motion, was not known to him at the time the cause was first heard and judgment rendered.

The bill of exceptions, as originally certified to this court, did not show that the court heard any evidence on the question of the divisibility of the mortgaged premises. After the appeal a motion was made in the court below by the appellee to amend the bill of exceptions in that particular. It was so amended, and on *certiorari* was certified, as amended, to this court. The appellant has assigned error on this ruling, having excepted to the action of the circuit court in ordering the amendment.

The original bill of exceptions was prepared by counsel for the appellant, and was filed in vacation under an order giving sixty days time for that purpose. In such a case, we think, the adverse party may afterward move for the correction of omissions or inaccuracies in the bill, so that it may speak the truth as to what took place on the trial.

If the motion to amend had been made by the party who prepared and caused the bill to be signed in the first instance, a different question would be presented.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the supplemental order and judgment of the Ohio Circuit Court, made at its April term, A. D. 1878, so far as it determined that the lands named in its former judgment could not be sold in parcels without injury to the in-

 Sherman *et al.* v. Hogland.

terests of the parties, is affirmed. And the residue of said supplemental order and judgment is reversed; and this cause is remanded to said circuit court, with instructions to overrule the motion of the plaintiff below to modify the judgment and decree rendered in said cause at the January term of said court, A. D. 1878, except so much thereof as sets up the omission of said court to ascertain and determine, at said January term, whether the lands described in said judgment and decree could be sold in parcels without injury to the interests of the parties; and it is further ordered that the appellant pay one-half the costs in the court below and in this court, and that the appellee pay the residue of said costs.

 No. 7398.

SHERMAN ET AL. v. HOGLAND.

PRACTICE.—*When Interrogatories may be Filed.*—*Harmless Error.*—It is not necessary that interrogatories be filed at the time of filing any specific pleading. They may be filed at any time before the issues in the case are closed. The error, if any, in compelling a party to answer interrogatories is harmless, where such interrogatories are not offered in evidence.

FRAUDULENT CONVEYANCE.—*Complaint.*—*Value of Property.*—A complaint to set aside a fraudulent conveyance of real estate is not insufficient for failure to aver the value of such real estate, but such complaint must show that the defendants had no property subject to execution at the time the action was commenced.

SAME.—*Evidence.*—*Husband and Wife.*—*Conspiracy to Defraud Creditors.*—*Declarations of Husband.*—Where a husband and wife act in concert to defraud the creditors of the husband, the declarations of the latter, made before the common purpose was accomplished, are admissible in evidence against both.

SAME.—*Statements of Wife to Assessor as to Her Property.*—In such case the sworn statements of the wife to the assessor, as to her separate property, are properly admissible in evidence, as showing her ability or inability to pay for the real estate conveyed to her.

73	472
127	242
73	472
131	486
131	470
73	472
136	686
73	472
137	816
73	472
164	848

Sherman *et al.* v. Hogland.

SAME.—In such case, the existence of a confidential relationship between the grantor and grantee, and the pendency of an action against the former, are proper circumstances for the jury to consider as indications of fraud.

SAME.—*Consideration.*—The rule, that where the grantee has paid a valuable consideration for the conveyance, it can not be adjudged fraudulent, unless the grantee had notice of the fraudulent intent of the grantor, does not apply to cases where no consideration was paid.

SAME.—*Instruction.*—*Outstanding Title.*—An instruction in such case, that the lands claimed by the husband could not be subjected to the payment of his debts, where the wife had purchased an outstanding title, whether such title was paramount or not, was rightly refused.

SAME.—Under section 456 of the code, property fraudulently conveyed by a debtor may be sold without appraisement.

INSTRUCTIONS.—It is not error for the court to refuse instructions which are correct as abstract propositions of law, but irrelevant to the case made by the evidence; nor is it error to refuse instructions, where the court has fully covered the points in its own instructions.

From the Carroll Circuit Court.

B. B. Daily, for appellants.

C. R. Pollard, for appellee.

ELLIOTT, J.—The appellee sought to have a conveyance of real estate, made to the appellant Rebecca Sherman, set aside as fraudulent, and obtained a decree setting it aside. Appellants unsuccessfully demurred to the amended complaint of appellee, and here present the question of the correctness of the ruling upon the demurrer. It is contended that the complaint is insufficient because it does not allege the value of the real estate charged to have been conveyed. Allegations of value are very seldom material, and we do not think they are so in the present instance. We do not feel authorized to reverse the case upon the ground that the complaint does not state the value of the property, for the omission is one which can not possibly do the appellants any injury, and which does not affect the substantial merits of the controversy.

It is urged that the complaint is insufficient because it does not aver that the appellants had no property subject to execution at the time the action was instituted, and we are

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referred to the case of *Bruker v. Kelsey*, 72 Ind. 51. We believe the doctrine of that case to be right, and that the plaintiff in a suit to set aside a fraudulent conveyance of lands must show that the defendants had no property subject to execution at the time of the commencement of the action, but the appellants can not receive any aid from that doctrine, because the complaint in this case does show that the grantor in the alleged fraudulent conveyance had no property subject to execution at the time the action was commenced. The allegations of the complaint under mention are more full and direct than were those in the complaint in *Bruker v. Kelsey*, *supra*. It is not only shown that an execution was issued and return of *nulla bona* made, but it is also alleged that the grantor did not have property subject to execution, either at the time the conveyance was made or the action brought, out of which the appellee's claim could be made. Enough is averred to show that an ordinary legal remedy would not afford adequate relief, and that appellees have a right to subject the land alleged to have been fraudulently conveyed to seizure and sale upon execution.

Appellants complain of the action of the court in compelling the appellant Mervin Sherman to answer interrogatories propounded to him by the appellees. The argument upon this point is that the interrogatories were not filed with a pleading affecting said appellant; that they were, therefore, improperly filed, and the appellant ought not to have been compelled to answer them. The code does not mean to restrict the right to file interrogatories to the time of filing any specific pleading, but means that they may be filed at any time before the issues are closed, or the right to file pleadings has terminated.

It is insisted that the court erred in compelling Mervin Sherman to answer interrogatories because he was not a competent witness, as his wife is a party to the action. The assumption upon which this argument is based is unwar-

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ranted ; but, if it were a just one, no harm was done, because the interrogatories were not offered in evidence. Judgments are never reversed because of harmless errors.

The ruling denying the appellants a new trial brings before us questions upon rulings admitting evidence, giving and refusing instructions, and the sufficiency of the evidence to support the verdict. The court, over the objection of appellants, permitted witnesses to testify as to declarations made by Mervin Sherman. These declarations were admissible against the party by whom they were made, and upon that ground, if upon no other, were entitled to admission. If appellants were acting in concert in an attempt to defraud the creditors of one of them, then the declarations of one, made before the common purpose was accomplished, would be admissible against all. There was enough evidence tending to prove a collusive attempt and design to defraud the creditors of Mervin Sherman, to justify the admission of his declarations against all of the appellants.

There was no error in permitting the appellees to give in evidence the sworn statements of Rebecca Sherman, made to the assessor, wherein she gave a detailed statement of the property owned by her and subject to taxation. The statements were competent for the purpose of showing the ability of Mrs. Sherman to purchase and pay for the real estate conveyed to her. If, from these sworn statements, it appeared that she had no means with which to buy property, the jury might have inferred that the conveyance to her was a purely voluntary one, and, therefore, fraudulent as to creditors.

The third instruction given by the court is as follows : “Fraud is never presumed, but must be clearly proven. A conveyance of property made and received for the purpose of hindering, delaying and defrauding creditors, is void as against creditors. The burden of proving such fraud rests upon the creditor attacking it. But the proof is seldom di-

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rect proof, but usually consists of a chain of circumstances that indicate and usually accompany fraud. They are, first, the parties sustain confidential relations to each other; second, concealment of the fact of the transfer of title; third, the vendor being at the time of the transfer heavily indebted and pressed for the payment, by suit or otherwise; fourth, the existence of a recent prior contract whereby the grantor is made to appear under obligations to make the transfer; fifth, the want of other property or means of the debtor sufficient to pay his debts." This instruction is awkwardly framed, and is somewhat obscure, but is not erroneous. Appellants' counsel insists that it is erroneous because it tells the jury that among one of the indications of fraud is that of the existence of a confidential relationship between the grantor and grantee, and, in support of this position, cites *Tenbrook v. Brown*, 17 Ind. 410. That case is not in point. The court does not tell the jury that the relationship affords a presumption of fraud, but simply that it is one link in the chain of circumstances tending to establish fraud. It is also urged that the instruction is erroneous because it places among the indications of fraud the fact that there was a pending action at the time the conveyance was made, and counsel cite *McMahan v. Morrison*, 16 Ind. 172; *Lowry v. Howard*, 35 Ind. 170. The rule, that the pendency of an action will not defeat a conveyance if made in good faith, is declared by these cases, and we give it our full approval; but that rule is a very different one from that upon which counsel here insists. A conveyance will not be declared fraudulent, although made when many actions are pending, if made in good faith; nor will the fact that actions are pending be of itself sufficient to overthrow the conveyance, but the fact that an action is pending is always proper for the consideration of the jury, and it is not error to direct their attention to it as one of the circumstances usually attending a conveyance made to defraud creditors. The instruction

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does not declare that the fact that an action is pending will justify an inference of fraud, but simply that it is one of the circumstances usually accompanying and indicating a fraudulent conveyance of property.

The sixth instruction given by the court is as follows :

“I have indicated to you some of the badges of fraud. A badge of fraud is a fact calculated to throw suspicion upon a transaction, and calling for an explanation. Its only effect, in general, is to require proof of the circumstances connected with the transfer, and of the good faith of the parties thereto. It is not conclusive of fraud, but simply an inference drawn by experience from the customary conduct of men, and hence is open to any reasonable and fair explanation.” This instruction is substantially correct. The court does not tell the jury that a badge of fraud conclusively condemns a transaction as fraudulent, as counsel supposed, but simply that it is one of the indications of fraud. This is the true rule. Badges of fraud afford grounds of inference from which the jury are authorized to conclude that a transaction surrounded by them is fraudulent. The party against whom they are adduced is at liberty to explain them if he can, but if sufficient in number and importance, and not explained, they will supply substantial grounds for pronouncing a transaction void upon the ground of fraud. The instruction asserts nothing in conflict with the rule declared in the case of *Jaeger v. Kelley*, 52 N.Y. 274. In that case it was held, that it is not enough to create a suspicion of wrong. To invalidate a sale, tangible facts must be proved, from which a legitimate inference of a fraudulent intent can be drawn. This is doubtless good law, and nothing said in the instruction is hostile to it, for it simply calls the attention of the jury to facts which they may properly consider as *indicia* of fraud, but it does not attempt to declare that they are sufficient to establish fraud.

The third and fourth instructions asked by the appellants,

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and refused by the court, assert that a conveyance is not to be deemed fraudulent solely upon the ground that it was made without consideration. These instructions assert an abstract proposition, which would be correct if applied to a proper state of facts. But, in this case, they were rightly refused, if for no other reason than that they were not relevant to the case made by the evidence. There was no error in refusing them, because the court, in its instructions, fully and explicitly instructed the jury upon the points covered by these instructions, and in quite as favorable terms as appellants had any right to ask.

The seventh instruction asked by appellants asserts, without qualification, that the plaintiffs could not recover unless they proved that the grantee had notice of the grantor's fraud. It was rightly refused. It is true, that, where the grantor receives a valuable consideration from the grantee, the conveyance can not be adjudged fraudulent unless it be shown that the grantee had notice of the fraudulent intent of the grantor, and, if this instruction had asserted this proposition it would have been correct; but it goes much further, and declares that, in no case, is a conveyance fraudulent unless the grantee participated in, or had notice of, the grantor's fraudulent purpose. The instruction, as asked, was entirely too broad, and, under the evidence, would have misled the jury had it been given. If it had qualified the general proposition asserted, by adding words limiting the rule to cases where some consideration had been paid, then its refusal would have given appellants just ground of complaint. The cases cited by appellants do not apply to cases where the conveyance is without consideration, but apply only to cases where some consideration moves from the grantee.

The eighth instruction asked by appellants is as follows: "If you find from the evidence, that the lands mentioned in the complaint were in the possession of the defendant Mervin Sherman, and held by him, and that after his marriage with

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the defendant Rebecca, another person, to wit, one Jenkins, claimed to hold a paramount title to the lands, it makes no difference whether the title of the said Jenkins was paramount or not, if the defendants Mervin and Rebecca agreed to buy the title so held by said Jenkins; and should you find that said title was purchased from said Jenkins, and the consideration therefor paid for out of the money or separate estate of the defendant Rebecca Sherman, with the understanding that the title so conveyed by said Jenkins was to be conveyed to her, and the defendant Mervin had the same conveyed to himself, he would hold the lands simply as a trustee for the said Rebecca, and they would not be subject to the payment of his debts."

This instruction was rightly refused. It conveys the meaning that whether the purchase from Jenkins was in good or bad faith, it would give the appellant Rebecca Sherman a title as against the creditors of the husband. This is not the law. If the purchase from Jenkins was merely colorable, and designed to put title in the name of Rebecca Sherman, it would not be valid as against her husband's creditors. The natural inference from the statement of the instruction, that "it makes no difference whether the title of Jenkins was paramount or not," is that no matter what kind of a title Rebecca Sherman had bargained for, it would supersede that of her husband, and place the title to the land in her beyond the reach of the husband's creditors. The wife of a debtor can not get title to land already owned by her husband, by buying an outstanding claim which is without substantial foundation, and thus prevent it from being applied in payment of her husband's debts. If Mervin Sherman had previously owned the property, his wife could not, by buying, even though in the utmost good faith, an outstanding claim which was not valid, secure a title which would be superior to that of her husband, or paramount to the rights of creditors. But the instruction does not even restrict the rule to

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cases where the purchase of the outstanding title is made in good faith, but extends it to all purchases of foundationless outstanding claims, whether made in good or bad faith.

Two juries have found against appellants, and this, of itself, supplies to us an almost conclusive presumption that the verdict is sustained by the evidence. Notwithstanding this, we have examined the evidence with care, and think it fairly supports the conclusion reached by the jury. That the juries have examined and considered fully the evidence given upon all the material points, is evidenced by the fact that they have made full answers to interrogatories upon all the important elements of the case.

There remain for consideration two questions. The first arises upon the overruling of appellants' motion for judgment on the answers made by the jury to the interrogatories propounded to them. It is insisted that, as the answers show that Mrs. Sherman had paid three hundred dollars for an outstanding title, the conveyance can not be deemed fraudulent. If this answer stood alone, it would not create such an irreconcilable conflict with the general verdict as would warrant the overthrow of the latter. The answer, however, is but one of many, and, taking all the answers together, the appellee would have been entitled to judgment if the general verdict had been for the appellants.

The second of the questions last referred to arises upon the provision in the decree directing that the property should be sold without relief from appraisement laws. Section 456 of the code very decisively settles this question against the appellants.

Judgment affirmed.

Opinion filed at November term, 1880.

Petition for a rehearing overruled at May term, 1881.

Brownlee v. Goldthait et al.

No. 7776.

BROWNLEE v. GOLDTHAIT ET AL.

PRACTICE.—Exception.—Demurrer.—Supreme Court.—Where the record on appeal fails to show any exception to the ruling on a demurrer, questions arising thereon will not be considered by the Supreme Court.

PAYMENT.—Application by Creditor.—A creditor has the right to apply a payment to either a note or book account held by him against a debtor in the absence of any application by such debtor.

From the Grant Circuit Court.

— Kersey and J. Brownlee, for appellant.

A. Steele, R. T. St. John and E. Goldthait, for appellees.

ELLIOTT, J.—Two questions are discussed by appellant's counsel. The first question grows out of the action of the court in overruling appellant's demurrer to the third paragraph of the reply of the appellees. The question which counsel discuss is interesting and important, but is not properly before us. The record does not show any exception to the ruling upon the demurrer. The remaining question is presented by the ruling refusing appellant a new trial. The single question which counsel argue, in considering the assignment of error based upon the overruling of the appellant's motion for a new trial is, that the appellees recovered a larger sum than they were entitled to under the evidence. The position of appellant is, that credits ought to have been applied upon the note sued on in the first paragraph of the complaint, and not upon the account for goods sold and delivered, upon which the second is based. We have looked through the evidence and find none showing that the appellant made any application of the payments, and the creditor had, therefore, the right to make the application.

A long list of figures is presented to us, by counsel, and a calculation made thereon, showing, upon the theory assumed by counsel, an error in the amount of recovery of something more than seventy dollars; but as all the items therein

Hendricks v. The State, ex rel. Huff.

stated were fully before the jury, and have been passed upon both by the jury and the trial court, we can not disturb the conclusion declared in the verdict and judgment. The correctness of the claims of payment and of set-off asserted by the appellant were determined against him by the jury who were charged with the special duty of truly finding the facts, and whose means and opportunity of arriving at a correct result upon all issues of fact are much superior to any we can possibly have.

We have confined our investigation to the two questions discussed in appellant's brief, for the reason that we deem all others waived.

Judgment affirmed.

No. 7729.

HENDRICKS v. THE STATE, EX REL. HUFF.

SUPREME COURT.—*Appeal.—Practice.—Notice to Co-Party.*—Where one of several defendants appeals to the Supreme Court without giving notice thereof to his co-defendants, as required by section 551 of the code, the appeal will be dismissed.

From the Grant Circuit Court.

J. Brownlee, H. Brownlee, I. VanDevanter and J. W. Lacey, for appellant.

B. F. Williams, J. F. McDowell and G. L. McDowell, for appellee.

Howk, C. J.—In this case, Hiram K. Hendricks alone has appealed to this court from a judgment rendered by the court below against him and one Lewis Foster, and in favor of the appellee's relator, in a suit on a guardian's bond. The record and files of the case show that the appellant,

 Murphy v. The Board of Commissioners of Monroe County.

Hendricks, has not served notice of his appeal on his co-defendant, Foster, and filed the proof of such service with the clerk of this court, in conformity with the requirements of section 551 of the code, 2 R. S. 1876, p. 239. Upon the ground of the appellant's failure to comply with the express provisions of the statute, in respect to such notice, the appellee's relator has moved the court to dismiss this appeal. For the reason given, the motion must be sustained and the appeal dismissed accordingly. *Reeder v. Maranda*, 55 Ind. 239; *Pierson v. Hart*, 64 Ind. 254; and *Hammon v. Sex-ton*, 69 Ind. 37.

The appeal is dismissed, at the appellant's costs.

 No. 7738.

MURPHY v. THE BOARD OF COMMISSIONERS OF MONROE
COUNTY.

73	483
146	167

73	483
170	307

LIQUOR LAW.—License.—Applicant.—Residence.—Statute Construed.—Under section 3 of the act to regulate the sale of intoxicating liquor, 1 R. S. 1876, p. 869, it is not necessary that an applicant for license should be a resident of the ward, town, township or county in which the place where the liquor is to be sold is situated.

SAME.—Description of Premises.—In an application for license to sell liquor, under section 3, *supra*, a description so reasonably full and certain, of the premises where it is proposed to sell, as to point out the exact location thereof, is sufficient.

SAME.—Parties.—Board of Commissioners.—In such cases, the board of commissioners is not a proper party, on appeal to the circuit court, but where the board voluntarily appeared in that court, and contested such application, it will not be heard to move for a dismissal of the appeal, in the Supreme Court, on that ground.

From the Monroe Circuit Court.

J. W. Buskirk and *H. C. Duncan*, for appellant.

W. C. L. Taylor, for appellee.

Murphy v. The Board of Commissioners of Monroe County.

ELLIOTT, J.—The appellant applied to the board of commissioners of Monroe county for a license to sell intoxicating liquors. Charles Blake appeared before the commissioners, and, describing himself as a remonstrant, moved to dismiss the application, assigning, in support of his motion:

1st. That the application did not show that the applicant was an inhabitant of the ward in which the place where the liquor was to be sold was situated; and,

2d. That the application did not describe the precise location of the premises in which appellant proposed to retail liquor.

The board sustained this motion, and the applicant appealed to the circuit court. The commissioners renewed this motion in the circuit court, and it was again sustained. From this ruling this appeal is taken.

The definition given the word “inhabitant” by this court in *Ex parte Laboyteaux*, 65 Ind. 545, is directly in favor of the position here assumed by appellant upon the first ground stated in Blake’s motion to dismiss. In that case it was said: “The act says that any *male inhabitant* having certain other qualifications may obtain a license by certain proceedings, which it prescribes. That designation applies alike, we think, to all the male inhabitants of the State of the class, to which a license may be granted, without reference to their residence in any particular place in this State.”

The second ground stated in remonstrant’s motion is without foundation. The premises are described with great particularity. It is true, as Blake’s counsel assert, that the statute does require that a particular description shall be given by the applicant, but no more is meant than a description so reasonably full and certain as to point out the exact location of the premises. It is not meant that there shall be a detailed description of the kind of a house, or any such thing as that.

The board of commissioners here move to dismiss the ap-

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peal, for the reason that the remonstrant, and not the commissioners, ought to have been the appellee. We have no doubt that the board was not the proper party, and had the objection been made in the court below it should have prevailed. Where the commissioners do no more than hear and determine a controversy between parties, they are not to be treated as themselves the litigants. *Jamieson v. The Board, etc., of Cass Co.*, 56 Ind. 466. In this case, however, the commissioners voluntarily assumed the character of defendants. They entered into the contest as sole defendants; they asked, upon affidavit, and obtained a change of judges; they filed in the circuit court, in their own names, the motion which resulted in the appellant's defeat. Having appeared as the adversaries of the appellant in the court below, and having in that character fought out the contest successfully against the appellant, the commissioners are not now in a situation to rightfully assert that they were not the proper parties defendants. As they, by voluntary act, assumed the character of defendants, they must retain it until the judgment which they obtained in that character shall cease to be effective against the appellant. It would be gross injustice to permit the commissioners to escape judgment of reversal, after having so successfully waged the contest as to utterly discomfit the appellant, upon the ground that they were really not defendants, but had only acted as original triors of a controversy between an applicant and a remonstrant.

Judgment reversed, at the costs of appellee.

 No. 7546.

KISSELL ET AL. v. ANDERSON.

73	485
148	594

PRACTICE.—*New Trial.*—*Record.*—*Presumption.*—*Supreme Court.*—Where the written motion and causes for a new trial are not set forth in the

Kissell *et al.* v. Anderson.

record, the Supreme Court will presume, on appeal, that such motion was properly overruled.

SAME.—*Judgment.*—Objections to the form or substance of a judgment, in whole or in part, can not be made for the first time in the Supreme Court.

SAME.—*New Trial.*—That the finding is not sustained by sufficient evidence, is a proper cause for a new trial, and can not be complained of as error, for the first time, in the Supreme Court.

SAME.—*Proceedings Supplementary to Execution.*—Trials, either of law or of fact, may be had in proceedings supplementary to execution, and error occurring therein must be saved and presented in and by the record, on appeal to the Supreme Court, in the same manner as in other civil actions.

From the Marion Superior Court.

F. M. Finch and *J. A. Finch*, for appellants.

C. P. Jacobs, for appellee.

Howe, C. J.—This was a proceeding supplementary to execution, by the appellee, Hayden P. Anderson, as the execution plaintiff, against the appellant Peter Kissell, as the execution defendant, and the appellant John Kissell, and divers other persons, who were alleged to hold certain property of, or to be indebted to, the said execution defendant. The proceedings were commenced under, and in conformity with, the provisions of sections 519 and 522 of the civil code. Upon the hearing of the cause, at special term, the court found that certain personal property, particularly described, claimed by the appellant John Kissell as his separate property, was not the property of said John Kissell, but was in fact the property of the execution defendant, Peter Kissell, and subject to the lien of the appellee's execution, then in the hands of the sheriff of Marion county; and, upon this finding, the court ordered and adjudged that the appellants, Peter and John Kissell should forthwith surrender the said personal property to the sheriff, etc., for levy and sale under said execution.

On appeal to the general term of the court, the judgment

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at special term was affirmed ; and from this judgment of affirmance this appeal is now here prosecuted.

By a proper assignment of error, the appellants have brought before this court the errors assigned by them in the general term of the court below, which were as follows :

“1. The court erred in refusing the defendants a new trial herein ;

“2. The court erred in rendering judgment for the plaintiff for the amount of property mentioned in the decree ;

“3. The court erred in finding that the corn and other grain, potatoes and hay, raised on the farm by John Kissell, were the property of Peter Kissell and subject to the plaintiff's execution.”

The appellants' motion for a new trial is not in the transcript of the record on file in this court, but the clerk of the court below has certified that the motion was “not on file.” The “written causes, filed at the time of making the motion” for a new trial, and upon which the motion was made, are a necessary part of the record, and in their absence we can not well say that the trial court erred in overruling the appellants' motion for a new trial in the case now before us. In section 352 of the code it is provided that a new trial may be granted for certain specified causes, some of which causes, under section 355 of the code, “must be sustained by affidavit showing their truth.” When the written motion and causes for a new trial are not set forth in the record, this court can not decide that the court below erred in overruling such motion, for it might well be that the motion had been overruled for the reason that the cause or causes relied upon for a new trial had not been properly assigned therein. Every reasonable presumption must be entertained and allowed in support of the court's decision in overruling the motion for a new trial, and as the motion and the causes assigned therein, for such new trial, are not found in the transcript, it is certain we think, that the record does not

Kissell *et al.* v. Anderson.

exclude the presumption, that the appellants' motion was correctly overruled, for good and sufficient reasons. *Myers v. Murphy*, 60 Ind. 282; *Stott v. Smith*, 70 Ind. 298; *Bowen v. Pollard*, 71 Ind. 177. The first alleged error, therefore, is not apparent in the record.

No objections were made below, by the appellants or either of them, either to the form or substance of the judgment rendered, in whole or in part. It is well settled by the decisions of this court, that such objections can not be made for the first time, in this court. Therefore, the second error is not well assigned and presents no question for our decision. *Brownlee v. Hare*, 64 Ind. 311.

By the language used in the third alleged error, we suppose that the appellants intended to assign, that the finding of the court, as to the articles of property mentioned in said error, was not sustained by sufficient evidence. This would have been a proper cause for a new trial, in a motion therefor addressed to the trial court; but the record fails to show that it was assigned by the appellants as a cause for new trial, and it cannot be complained of, as error, for the first time in this court. This rule of practice is well settled and is, we think, wise and just.

Under the early decisions of this court, in regard to proceedings supplementary to execution, under section 522 of the code, it is doubtful if any motion for a new trial would have been deemed necessary to the proper presentation here of any erroneous decision of the trial court. But, in the recent case of *The Toledo, etc., R. W. Co. v. Howes*, 68 Ind. 458, it was decided by this court, and, we think, correctly so, that, in proceedings supplementary to execution, under said section 522, against the execution defendant, and either his debtor or the custodian of his property, "pleadings may be filed and issues, either of law or of fact, may be joined by and between the plaintiff and the defendants, or either of them, or by and between the defendants, and

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such issues so joined may be heard, tried and determined in the same manner as other issues of law or fact, in other civil actions or proceedings." The effect of this decision is to place proceedings supplementary to executions substantially on the same footing as any other civil action; and, therefore, if any party to such proceedings may wish to take the opinion of this court, in regard to any supposed error of the trial court therein, we are of the opinion that such error must be saved and presented in and by the record, in the same manner as in any other civil action. It follows that in the case at bar, a motion for a new trial, addressed to the court below at special term, was necessary to the proper presentation of the matters complained of as erroneous either in the general term below or in this court. *McMahan v. Works*, 72 Ind. 19.

We find no error in the judgment.

The judgment is affirmed, at the appellants' costs.

73	489
129	149
73	489
162	450
162	451

 No. 7352.

CLARK v. STEPHENSON ET AL.

PARTITION.—*Objections to Report of Commissioners.*—*New Trial.*—*Assignment of Error.*—*Practice.*—*Supreme Court.*—Rulings on objections filed to the confirmation of the report of commissioners appointed to partition real estate can not be presented to the Supreme Court by an assignment of error on the overruling of a motion for a new trial, but must be presented by an assignment of error directly on the rulings of the court on such objections, on exceptions to such rulings saved by bill of exceptions. ELLIOTT, J., dissents.

SAME.—*Parties.*—*Lien-Holders.*—Lien-holders on real estate are proper parties in a suit for partition thereof.

From the Hamilton Circuit Court.

M. A. Chipman and *H. C. Ryan*, for appellant.

D. Moss and *R. R. Stephenson*, for appellees.

Clark v. Stephenson et al.

WOODS, J.—Appeal from a judgment in partition. The appellant has assigned error upon the action of the court in overruling his demurrer to the complaint and his motion for a new trial. The action was by the widow of the deceased owner of the land, and her share was set off.

In reference to the complaint, the counsel for the appellant claim, “that the right of the widow to partition is against the heirs alone, and not against the creditors of the estate of her deceased husband. Their right, if any, is independent of hers, and can not be curtailed or enlarged by her claims or concessions.” The appellant was a mortgage creditor, having a mortgage, in which the widow had not joined, on a part of the lands, other parts being under other mortgages, one of which the widow had joined in executing; while in the others she had not joined. There were also judgment creditors. The estate was insolvent. The total of the real estate exceeded in value \$10,000, but was worth less than \$20,000. The mortgage in which the widow had joined amounted to \$12,000, and was about equal to the value of the 400 acres of land covered thereby. It was plainly proper that the appellant and other lien-holders should have been made parties. *Milligan v. Poole*, 35 Ind. 64; *Applegate v. Edwards*, 45 Ind. 329.

In her petition for the partition, the widow claimed only a one-fourth interest in the whole real estate. Issues of fact were formed upon the petition and the answers of the respective parties, which were tried by the court. The court made a special finding of the facts, and a statement of legal conclusions therefrom, finding, among other things, that the widow's share, stated as one-fourth of the whole, could be set off to her advantage, and without injury to the other interests, in a certain designated part of the lands, including the portions covered by the mortgage of the appellant and by the other mortgage in whose execution the widow did not join. An interlocutory order was made determining the re-

Clark v. Stephenson *et al.*

spective rights and interests of the parties, and appointing commissioners to set off the widow's share as found and stated. Each party saved exceptions to the conclusions of law. The commissioners made a report at the next term of the court, the material part of which is in the following words: "We do hereby set off to said petitioner, in lieu of her undivided one-fourth interest as widow, the following real estate, situate in Hamilton county, Indiana, to wit: Twenty-six and two-thirds ($26\frac{2}{3}$) acres off the west side of the west half of the north-east quarter of section eighteen (18), township nineteen (19), range six (6) east; she * * to hold and enjoy said lands, which is one-third in value, in severalty, and free from all demands of the defendants, Scarce and Clark, against the same by virtue of certain mortgages thereon held by them and executed by said decedent in his lifetime. We also set off to her, in fee-simple, all that part of the north-west quarter of said section eighteen," etc., (here follows the description of a tract containing fifty to sixty acres, perhaps). "All of which is respectfully submitted to the court for approval."

The appellant filed objections to the confirmation of this report on the ground, substantially, that said commissioners, as against him, had assigned and set off to the petitioner one-third of said real estate, when, as against him and the other creditors, she is entitled to but one-fourth part of said real estate, thereby depriving him of one-twelfth of his security if the report be approved. This objection the court overruled, and rendered judgment on the report. The appellant then filed a motion for a new trial, of which the following is a copy:

<p>"LOUVINA STEPHENSON v. "JOHN C. STEPHENSON ET AL.</p>	}	<p>State of Indiana, Hamilton County, ss.:</p>
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"Comes now the defendant, Haymond W. Clark, and moves the court for a new trial in the above cause, for the following causes, namely:

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“1. That the court erred in overruling the exceptions of this defendant to the report of the commissioners who made partition.

“2. That the court erred in confirming the report of the commissioners making partition in said cause.

“3. That the finding and judgment of the court upon the exceptions of this defendant to the report of the commissioners who made partition, is not sustained by sufficient evidence.

“4. That the finding and judgment of the court upon the exceptions of this defendant to the report of the commissioners who made partition, is contrary to law. Wherefore he asks for a new trial.

“CHIPMAN & RYAN, Attorneys for Clark.”

The report does not show, as counsel for the appellant contend, that the commissioners exceeded their authority by setting off to the widow one-third of the real estate, while the order was to allow her only one-fourth. As we interpret it, the report means merely that the $26\frac{2}{3}$ acres given the widow out of the tract of land covered by the mortgages of the appellant and Scarce constituted one-third in value of that tract; and these $26\frac{2}{3}$ acres, together with the other parcel which was set off to her, constituted the one-fourth in value of the entire realty, the same being, in the language of the report, “set off to said petitioner in lieu of her undivided one-fourth interest as widow.” The question which we are asked to decide, therefore, comes to this: The widow being entitled, on account of the value of the property exceeding \$10,000, to only one-fourth, as against creditors, but, having joined in the execution of a mortgage to the amount of \$12,000, on a part of the realty, and as against the holder of that mortgage having no right in that part of the estate, save a worthless right to redeem, and there being other parts of the estate on which her husband had given mortgages in which she did not join, can she be allotted, out

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of the last named portions, the one-third thereof, in order to make up to her in value the one-fourth of the whole estate, the total value thereof being less than \$20,000, and, deducting the amount of the mortgage which she joined in executing, being less than \$10,000?

Counsel for the appellee, however, insist that the question is not in the record, as there is no assignment of error except on the overruling of the motion for a new trial, and that the exception to the report of the commissioners was not a matter to be presented by a motion for a new trial. We think the point well made. If it were conceded that the exception made to the report of the commissioners was well taken, and that the report ought on that account to have been set aside, still a new trial would not have been necessary. If the exception had been sustained, nothing more would have been necessary than an order setting aside the partition as reported, and requiring the commissioners or another set of commissioners, under proper and more specific directions, to do the work over.

The error assigned here should have been upon the refusal of the court to sustain the exception to the report, and to set the same aside. If the appellant had been dissatisfied with the finding of facts by the court, or claimed that the court erred in admitting or excluding evidence, or had been aggrieved at any action of the court in connection with the trial, his remedy would have been by motion for a new trial, as in ordinary cases; but the matter here complained of occurred after the trial had been had, and the correction of the mistake or wrong, if any was committed by the commissioners, required no new trial of any issue in the case. The proper rule of practice is clearly indicated in *Kern v. Maginniss*, 55 Ind. 459, where it is said: "If the appellants had any objection to the verdict of the jury, they should have moved for a new trial, and properly reserved their exceptions. If they had any objections to the report of the com-

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missioners partitioning the land, they should have shown good cause against it, and properly reserved their exceptions." This practice was followed in *Randles v. Randles*, 63 Ind. 93; *Griffy v. Enders*, 60 Ind. 23.

It is true that in *Kern v. Maginniss*, *supra*, and in other cases decided by this court, it is said that the report of commissioners stands as a verdict until set aside for cause shown. In *Lucas v. Peters*, 45 Ind. 313, citing *Lacoss v. Keegan*, 2 Ind. 406, and *Lake v. Jarrett*, 12 Ind. 395, besides certain cases from 4 Edwards Chancery and 19 Wendell, it is said: "The report of the commissioners is to be regarded in the light of a verdict of a jury rendered upon a trial at law; and it should be disturbed or interfered with by the court only upon grounds similar to those on which a verdict would be set aside, and a new trial granted." But it by no means follows that the objections to a report must be presented in a motion for a new trial. If it is not manifest from the quotations made therefrom, an examination of these cases and the cases referred to, will demonstrate that the courts in deciding them had under consideration, not the manner in which objections to such reports should be made and exceptions saved to the ruling of the court thereon, but the nature and grounds of the objections themselves, which should be deemed sufficient. If the objection be to the report, or to the conduct of the commissioners, the proper practice is to move to set aside or to vacate the report (*Freeman Cotenancy & Partition*, sec. 525); and, if the ruling of the court be adverse, to save the exception by a bill of exceptions, showing the motion, the grounds of objection, the proofs made, if any, and the action of the court; and, in this court, the error should be assigned directly on that action, just as upon a ruling on a demurrer.

The motion for a new trial is no more fit, and no more necessary, to save such a question than it is to present a ruling on a demurrer, or on a motion to modify a judgment, or

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to set aside a default, or for judgment *non obstante*, or the like, and, being unnecessary and irrelevant, an assignment of error upon the ruling on that motion, made for any such purposes, can not be deemed to present any question for decision. It may be said that the record shows plainly enough what question the appellant endeavored to bring to this court, and that the point was made below and passed on by the circuit court. So, too, in all the cases supposed above, if the new trial should be moved for on account of rulings on demurrer, motions to set aside default, or on account of any conceivable ruling of the court, and error should be assigned upon the overruling of that motion, it would be plain enough what was intended. Once we adopt such a test and rule of practice, we shall be driven to the position that any and all exceptions, if properly saved and assigned as causes for a new trial, will be considered and decided by this court if error is assigned on the overruling of the motion for a new trial. It will not do to say that the appellant's motion was miscalled a motion for a new trial, while, in fact, it was, and was intended to be, a motion to vacate the report. It begun by moving, and ended by praying, that a new trial be granted. It is so named in the clerk's entry of filing, in the court's order overruling it, and in the marginal note on the transcript.

The death of the appellant having been suggested, the judgment will be affirmed as of the date of the submission, to wit, May term, 1879.

Judgment affirmed, with costs.

DISSENTING OPINION.

ELLIOTT, J.—It is clear to my mind that the court below erred in approving the report of the commissioners, and, in my judgment, the erroneous ruling is presented for our consideration. I do not say that the error is presented in a

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technically proper mode ; on the contrary, I think the motion is in form faulty, and in name incorrect. But I do think that the erroneous ruling is substantially presented, and that we ought not to deny appellant his right because he has misnamed his motion and improperly designated the relief sought.

The error is in the name and form only. The motion should have been named a motion to vacate the report of the commissioners ; the relief asked should have been an order setting the report aside. The reasons assigned in support of the motion show with the utmost certainty and clearness, that the only relief sought was the vacation of the report, and the grounds upon which the right to that relief is based are stated with precision and particularity. I am unwilling to join in holding that the mistake in naming the motion and in designating the relief sought should result in the denial of a legal right.

It has been decided over and over again that a right result may be reached by a mode technically irregular and incorrect. Time and again it has been held that a motion may effectually accomplish that which it was, technically and properly, the office of a demurrer to bring about. I can not see why we may not properly apply this doctrine, which certainly is in harmony with the spirit of our code, to a motion which contains ample cause for the relief sought, and which with great certainty indicates the appropriate relief.

It has also been held in very many cases, that a ruling made in the progress of a cause must be presented to the court below for review, and that it can not be assigned on appeal as an independent error. The principle which underlies these cases is that rulings supposed to be erroneous must be presented to the trial court for review, in order to afford the court an opportunity to correct its own erroneous rulings. To be consistent, we ought, it seems to me, to hold that the ruling upon the appellant's exceptions should have been presented to the court for review. This is precisely what his

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motion did. True, it was wrongly named, and erred in the relief prayed, but we ought not to sacrifice substantial right to mere name and form. With all deference to the opinions of my brethren, I can not think that their conclusion can be harmonized with the long line of cases upon the subjects to which I have referred.

So, too, there are many cases holding that an error in the prayer of a complaint or counter-claim does not affect the complainant's right to relief. I can see no reason why such an error in a motion should result in a complete denial of relief. As I see it, the question is, or ought to be, to what relief do the substantive statements in the body of the pleading or motion entitle the party? Form, once such a potent factor in civil procedure, is now of comparatively little importance; so we must hold, or much impair the liberal and beneficial provisions of our code of civil procedure.

The name given a pleading or motion is of little or no importance. This court has often decided that calling a pleading an answer or a counter-claim, does not make it such, but that whether the pleading be the one or the other, will be determined from the material allegations therein contained. It has been very many times declared that the name bestowed upon a thing, by statute, does not determine the character of the thing. The name is of little importance in any case; the statements and purpose always of prime importance. Things are not to be judged of by their names, but by their essential and substantial qualities.

The frame of appellant's motion, the substantive parts of it, and the evident purpose, are so plain and manifest that there could not have been the remotest possibility of mistaking the object sought to be attained, or the relief which ought to have been granted. These are matters of substance, and ought not to be overborne by errors in form.

Entertaining the views expressed, no course is left me but that of dissenting from the opinion of the majority.

Armstrong v. Lawson.

No. 5646.

ARMSTRONG v. LAWSON.

73	498
137	539
73	498
152	432

GROWING TREES.—*Parol Contract of Sale.*—*Real Estate.*—*License.*—*Conveyance.*—*Parol Reservation.*—*Statute of Frauds.*—A tree growing upon land constitutes a part thereof, and a parol contract for the sale of such a tree passes no title thereto which can be enforced by legal proceedings. Such a contract may amount to a license to enter upon the land, cut down and remove the tree, but the license is one which may be revoked at any time before the tree is cut down; therefore, the reservation by *parol* of a growing tree by the grantor in a conveyance of real estate, by consent of the grantee, with the right to enter thereon and remove such tree after the conveyance is made, constitutes a mere license on the part of the grantee to the grantor to enter upon the land to remove the tree, for the revocation of which no action will lie.

From the Tipton Circuit Court.

A. F. Shirts, G. Shirts and J. W. Robinson, for appellant.
C. L. Henry, for appellee.

NIBLACK, J.—Action by Alfred Lawson against Oliver Armstrong, commenced before a justice of the peace of Madison county. An appeal was taken from the justice to the Madison Circuit Court. By a change of venue the cause was transferred to the court below, where, upon a trial, there was a finding and judgment for the plaintiff for ten dollars.

The complaint charged that, on the 12th day of December, 1874, the plaintiff sold and conveyed to the defendant a tract of land for the sum of three hundred and thirty dollars, and in further consideration of a green white oak tree growing on the land, worth thirty dollars, which tree the plaintiff was to have the privilege of afterward cutting down and removing; that, after the sale and conveyance of said tract of land, the defendant refused to permit the plaintiff to cut down and remove the tree, for which damages were demanded.

The deed, which was read in evidence at the trial, was :

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warranty deed in the statutory form, purporting to be only in consideration of the sum of \$333.33, without reservation as to anything growing upon, or connected with, the land conveyed by it. The plaintiff testified that he sold the land described in the deed to the defendant in the latter part of the year 1874, in consideration of the sum of \$333.00, and of a white oak tree, which was at the time growing upon the land; that the bargain was closed the day the deed was made, although the matter had been talked over for perhaps a week before the terms were fully agreed upon; that no value was fixed upon the tree at the time, and that no instrument in writing, except the deed, passed between the parties concerning the sale of the land, or the reservation of the tree; that, on the 31st day of March, 1875, the plaintiff, taking with him some hired men, went to the land to cut down and remove the tree, but the defendant refused to permit him to do so, saying that if he had come for the tree before the 1st of March he might have had it; that the defendant further said that the tree then belonged to him, and that he would not then allow it to be cut down and removed; that the tree was worth twelve dollars. There was other evidence concerning the refusal of the defendant to permit the tree to be cut down and removed, but it did not, in any manner, conflict with the testimony of the plaintiff upon that branch of the case.

The appellant argues that the evidence, a fair synopsis of which is given as above, did not sustain the finding of the court; that the alleged contract concerning the tree was only an attempted reservation of such tree at the time the land was conveyed, and that, as the contract was not in writing, it was not binding upon the parties.

On the other hand, the appellee maintains that, upon the doctrine of the case of *Heavilon v. Heavilon*, 29 Ind. 509, followed by that of *Harvey v. Million*, 67 Ind. 90, the con-

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tract for the reservation of the tree, testified to by the plaintiff, was a valid and obligatory contract upon the appellant.

It must, however, be borne in mind that the cases above named have reference only to the annual products of the soil, and not to growing trees on the land; to such annual productions as are the fruit of industry, and not to such things as have a perennial and permanent growth upon the soil. The case of *Pea v. Pea*, 35 Ind. 387, also cited by the appellee, has reference to fixtures located, and not to permanent structures erected, upon land.

In the case of *Owens v. Lewis*, 46 Ind. 488, the distinction between trees growing permanently on land, and the annual productions of the soil resulting from agricultural industry, was elaborately and exhaustively considered. The conclusion then reached was, and still is, well supported by authority; and the distinction observed in that case, between growing trees which descend to the heir, and annual crops which go to the executor, has a practical application to the case at bar. In that case it was, in effect, held that a tree growing permanently upon land constitutes a part of the land, and that a parol contract for the sale of such a tree passes no title to the tree which can be enforced by legal proceedings; that such a contract may amount to a license to enter upon the land and cut down and remove the tree, but the license thereby granted is one which may be revoked at any time before the tree is cut down.

The evidence in this case tended to show that there was an agreement, of some kind, for the reservation of the tree in controversy to the appellee, but that no means were used to make the agreement a binding obligation upon the appellant. The agreement testified to by the appellee can not be construed as having amounted to more than a license to enter upon the land and to take away the tree in dispute, and, as the license thus impliedly given was unconnected with any interest in the property to which it related, it was revocable

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at any time before the purpose for which it was granted was accomplished. The refusal of the appellant to permit the appellee to cut down and remove the tree was a revocation of the license conferred by the agreement of reservation, and left the appellee without any remedy, on account of such revocation. We are, consequently, constrained to hold that the finding of the court was not sustained by the evidence.

The judgment is reversed, with costs, and the cause remanded for a new trial.

No. 7608.

BICKNELL, ADM'X, v. WIDNER SCHOOL TOWNSHIP.

TOWNSHIP TRUSTEE.—*School Township.—Liability for Borrowed Money.—*

Contract.—Where money is loaned to a township trustee for the purpose of completing a needed and suitable school-house, the trustee not then having funds on hands to finish the same, and the money is applied to such purpose, the school township represented by such trustee and receiving the benefit of said money is liable therefor.

From the Knox Circuit Court.

W. H. De Wolfe and *S. N. Chambers*, for appellant.

F. W. Viehe and *R. G. Evans*, for appellee.

NEWCOMB, C.—Final judgment was rendered by the court below, in favor of the appellee, on a single demurrer to a complaint in two paragraphs, filed by the appellee.

The first paragraph alleges that on August 7th, 1874, the defendant, by her officers, was engaged in erecting a school-house suitable for the educational purposes of said township, said building being necessary therefor; and, in order to complete said building, it became necessary for the defend-

73	501
136	127

73	501
150	171
151	240

73	501
160	104

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ant to borrow money, and in order to obtain the same the defendant, by Thomas F. Chambers, her trustee, together with plaintiff's intestate, and three other persons named, executed their promissory note for \$2,000 to one Jessup, payable three years after date, with ten per cent. interest, payable semi-annually in advance, with a stipulation that the principal should become due on failure to pay interest within ten days of its maturity; that plaintiff's intestate and the other makers of said note, except said trustee, signed the same as sureties only; that defendant received on said note \$2,000, which was expended by said trustee in the erection of said school-house, which was necessary for the purposes aforesaid; that the defendant, by her said trustee and his successors in office, paid the interest on said note, including the instalment that became due August 7th, 1876, but thereafter failed and refused to pay such interest, in consequence whereof suit was instituted on said note, judgment was rendered against plaintiff as such administratrix and against the other sureties, and plaintiff was compelled to and did pay the sum of eight hundred dollars.

The second paragraph sets forth substantially the same facts as the first, relative to the erection of the school-house, the necessity for it, and the want of means to complete it, and avers that at the request of said township trustee, and for the purpose of completing said building, plaintiff's intestate advanced to said township and paid into the hands of said trustee the sum of five hundred dollars, which sum said trustee received and passed to the credit of the special school fund of said township; that afterward, on October 20th, 1874, said trustee reported the receipt of said sum of money to the Board of County Commissioners of Knox county, which report was by said board duly approved; that said township received the sole benefit of said sum, and the same was used in the erection and completion of said building.

Two questions have been discussed by counsel:

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1. Was the township trustee authorized to borrow money for the purpose stated in the complaint, and give a note therefor binding on the township?

2. If the trustee had not a right to anticipate the special school revenue by borrowing temporarily, does the fact that the money borrowed was applied to the legitimate purpose of completing a school-house render the school township liable to repay it?

By section 4 of the act of March 6th, 1865, 1 R. S. 1876, p. 780, each civil township and each incorporated town or city is declared to be a distinct municipal corporation for school purposes, by the name of the civil township, town or city corporation, respectively, and by such name may contract and be contracted with, and sue and be sued.

The township trustee is the only person or officer authorized by law to act for the school township. He is the executive officer of the township. There is no provision in the statute by which the voters of the township can act on any question as a township. Popular meetings are provided for only in certain matters affecting school district subdivisions.

Section 7 of the act above cited makes the township trustee the custodian and disbursing officer of the special school revenue, which includes all money raised by taxation in the township, for building, renting or repairing school-houses, providing furniture, fuel, etc., and for all other expenses of the schools, except for tuition.

By section 10 the trustee is required to take charge of the educational affairs of his township, to employ teachers, establish and conveniently locate a sufficient number of schools for the education of the children of the township, and build or otherwise provide suitable houses, furniture, apparatus, etc., necessary for the thorough organization and efficient management of the schools.

Section 12 empowers the trustee to levy a special tax, limited in amount, upon the property and polls of his township to enable him to execute the duties imposed by section 10.

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It was the duty of the trustee to provide a sufficient number of school-houses to accommodate the children of his township. Was he bound to delay the performance of this duty until sufficient funds were raised by taxation to build such houses, without contracting any debts? There are authorities to the effect that when a municipal corporation is empowered by law to make given purchases or improvements, and the use of money is necessary to the performance of the granted power or duty, the principal grant carries with it the implied right to create debts by borrowing money, or otherwise, in the execution of the authority so expressly granted, unless the charter or statutory power under which the corporation acts inhibits the creation of such debt. *Mullarky v. Town of Cedar Falls*, 19 Iowa, 21; *City of Galena v. Corwith*, 48 Ill. 423; *Sturtevant v. City of Alton*, 3 McLean, 393; *Mills v. Gleason*, 11 Wis. 470; *Commonwealth v. Councils of Pittsburgh*, 41 Pa. St. 278; *Bank, etc., v. Town of Chillicothe*, 7 Ohio, 354; *Clarke v. School District No. 7*, 3 R. I. 199.

In *Harney v. Wooden*, 30 Ind. 178, it was decided that a township trustee might employ teachers in anticipation of the actual collection of taxes levied to raise a special tuition fund under the act of March 9th, 1867.

In *Sheffield School Township v. Andress*, 56 Ind. 157, it was held that where a township trustee had incurred a debt in building a school-house he might lawfully execute a note, as trustee, for the amount due the builder, and that such note was a valid claim against the school township.

While this case affirms the power of a trustee to execute a note for work actually done, counsel for appellee have presented forcible arguments against the existence of authority to borrow money, in the first instance, on the credit of the township; for if the trustee is held to possess such power he may misapply the funds borrowed, and yet leave the town-

Bicknell, Administratrix, v. Wildner School Township.

ship liable to repay the loan ; while in the case where a building has been erected, no possible loss can accrue to the township by the execution of a note to the builder. It is also urged that the utter absence of any statutory authority to borrow money, and of a provision in his official bond for accounting for the proceeds of loans made by him, are conclusive considerations against the existence of the power.

We do not, however, deem it necessary, in this case, to pass upon the abstract question of the right of a township trustee to borrow money for building school-houses, and to bind the township by his note, or other obligation, therefor. The averments in the complaint, if he had not authority to execute a note, are sufficient to sustain a demand for money had and received, which was applied to the lawful use of the township. If the note described in the first paragraph of the complaint should be held void as to the township, then the plaintiff's intestate, and his co-makers, who are described as sureties, were principals in the note given to Jessup ; and the sum so borrowed by them, it is averred, was received by the township and applied to and expended in the erection of the school-house in question.

Where, as in this case, the lender assumes the burden of proving that his money was advanced to the township trustee, for the purpose of completing a needed and suitable school-house, that the trustee had not the means in hand to finish the building, and that the money so advanced was, in fact, applied to that purpose, the supposed danger of recognizing a general power in the trustee to borrow money does not exist ; and the township, having received the benefit of the money thus advanced, should, on the simplest principles of justice, repay it.

This court, in *The State Board of Agriculture v. The Citizens Street R. W. Co.*, 47 Ind. 407, held that although there may be a defect of power in a corporation to make a contract, if a contract made by it is not in violation of the

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charter of the company, or of any statute prohibiting it, and the corporation has by its promise induced a party relying upon such promise, and in execution of the contract, to expend money and perform his part thereof, the corporation is liable on the contract. This case was cited with approval in *Hitchcock v. City of Galveston*, 96 U. S. 341, where it was held that, although bonds issued by the city for street improvements might be invalid, yet the city was liable to the holder for work done under the contract

In Green's Brice's *Ultra Vires*, p. 724, the rule is stated in the following terms: "Persons who have in any way advanced money to a corporation, which money has been devoted to the necessities of the corporation, are considered in Chancery as creditors of the corporation to the extent to which the loan has been so expended." The large number of cases cited in the text and notes of this work fully sustain the rule as above laid down.

We hold, therefore, that the facts stated in the complaint present a good cause of action against the appellee, and that the circuit court erred in sustaining the demurrer thereto.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and is hereby, in all things reversed, at the costs of the appellee, and that this cause be remanded to the Knox Circuit Court for further proceedings in accordance with the above opinion.



73	508
135	370
73	508
155	288

No. 8145.

CHASE ET AL. v. SALISBURY.

WILL.—*Devise of Fee. with Power of Disposition.—Statute Construed.*—The following clause in a will, "I give to my beloved wife, S. D., and to our heir, S. A. D., all my estate, both real and personal, in their own right,

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with full power to sell and convey the whole, or any part thereof, for the payment of debts or otherwise, as they shall think proper," under the act of 1843, respecting wills, R. S. 1843, p. 485, gave the devisees a fee simple in the lands devised, including the right of disposition.

From the Steuben Circuit Court.

J. A. Woodhull and *J. I. Best*, for appellants.

R. W. McBride, for appellee.

MORRIS, C.—This suit was brought by the appellants, who were plaintiffs below, to quiet their title to certain real estate in Steuben county. The appellee appeared and answered in two paragraphs:

The first was the general denial.

The second was substantially as follows: One Levi Depue was the owner in fee simple of the lands in controversy, and on the — day of —, 1852, died, at said county and State, testate, seized of the same; that the will of said Depue was duly admitted to probate on the 24th day of April, 1852, and that by said will (a copy of which is attached to and made a part of the answer) said Depue devised the lands in controversy to his wife, Sarah Depue, and their daughter, Sarah Alvira Depue, said devise being in terms following, to wit: "Item 2. I give to my beloved wife, Sarah Depue, and to our heir, Sarah Alvira Depue, all my estate, both real and personal, in their own right, with full power to sell and convey the whole or any part thereof, for the payment of debts or otherwise, as they shall think proper; and further, that the said Sarah Depue is hereby appointed guardian to the said Sarah Alvira during her minority; and furthermore, should the said Sarah and Sarah Alvira die without issue, shall revert to Susan Lucinda Chase and to my nephew, Benjamin Hoxter, in equal parts." That afterward, on the 12th day of April, 1854, said Sarah Depue, for a full and valuable consideration, sold the undivided one-half of said land to appellee, and conveyed the same by deed, with full covenants of warranty, and also, at the same time, by order of the Steuben

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Common Pleas Court, she, as guardian of said Sarah Alvira, for a like consideration, sold and conveyed to appellee the remaining undivided one-half; that on the 21st day of December, 1867, said Sarah Alvira, being then over 21 years of age, quitclaimed to appellee the undivided one-half of said land; that appellee went into possession of said land April 12th, 1854, under said first-described conveyances, and is now, and has ever since been, in possession of the same, and claiming title thereto, under said deeds. It is further alleged that said Sarah and Sarah Alvira both died before this suit was commenced, leaving no issue, and that appellants Chase and Hoxter are the same Chase and Hoxter named in the will, and neither have, or claim to have, any interest in said land except through said will, and that appellee's only claims thereto are through said will and deeds.

The appellants demurred to the second paragraph of the answer. The court overruled the demurrer, and the appellants excepted. They refused to reply, and final judgment was rendered in favor of the appellee. The overruling of the demurrer is assigned as error here, and is the only question in the case.

The appellants admit that, if under the will the widow and daughter of the testator took the land in dispute in fee simple, the case was rightly decided below. But they insist that the widow and daughter took, at most, aside from the power of disposition, but a conditional fee; that the power of disposition has not, as shown by the second paragraph of the answer, been executed; that every conditional fee, based upon the condition that the donee had issue, was a fee tail at common law, and that the limitation over in favor of them falls within section 57 of the act of 1843, upon the subject. Rev. Stat. 1843, p. 424.

The will or clause, giving the land to Mrs. Depue and daughter, is in these words: "I give to my beloved wife, Sarah Depue, and to our heir, Sarah Alvira Depue, all my

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estate, both real and personal, in their own right, with full power to sell and convey the whole, or any part thereof, for the payment of debts, or otherwise, as they shall think proper.”

The testator died in 1852, and this devise is governed by the statute of 1843. Aside from the power of disposition contained in this will, the words of the devise, under sections 4 and 5 of the act of 1843 respecting wills, R. S. 1843, p. 485, would give to the widow and daughter of the testator a fee, including the right of disposition. The power given added nothing, really, to the devise. It is almost impossible to resist the conclusion that the words, “with full power to sell and convey,” etc., were added simply to give certainty and emphasis to the preceding words, rather than for the purpose of creating a substantive right, not before given. They, in fact, add nothing to the preceding devise. In the words of section 5, above referred to, the devise gave all the estate the testator had in the land, except in so far as the will manifestly showed an intention to give less.

Whether the power in this case should be construed as coalescing with and forming a part of the preceding words of devise, so as to give the widow and daughter an absolute fee, is not, perhaps, very material; for, however construed, the interest and power together give them, the devisees, something more than a conditional fee or fee tail at common law. And for this reason, section 57, R. S. 1843, p. 424, providing that where a remainder in fee is limited upon an estate which, before the abolition of estates tail, would have been adjudged a fee tail, shall be deemed a contingent remainder, vesting in possession upon the death of the first taker, does not apply.

It is insisted, however, that sections 186 and 187 of the same act do apply. They are as follows:

“Sec. 186. When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of

Stockton *et ux.* v. Stockton.

a particular estate, for life or for years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estate limited thereon, in case the power should not be executed, or the lands should not be sold for the satisfaction of debts during the continuance of such particular estate.

“Sec. 187. When a like power of disposition shall be given to any person to whom no particular estate is limited, such person shall also take a fee subject to any future estates that may be limited thereon, but absolute in respect to creditors and purchasers.” R. S. 1843, p. 447–8.

Obviously, section 186 does not apply to this case. By its terms, it applies only to cases where the power has the effect of enlarging a particular estate, for life or for years, into a fee. Here, aside from the power, there is no particular estate for life or for years. The estate devised is a fee.

Nor does section 187 apply. It is intended to apply where no particular estate is devised—where nothing is given but the power, not where a fee is given. Under section 187, where a power of disposition alone is given, the exercise of the power by the donee passes the fee.

We conclude that the judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be, and the same is hereby, in all things, affirmed, at the costs of the appellants.

73	510
134	404
73	510
141	122
73	510
149	411
152	308

No. 7122.

STOCKTON ET UX. v. STOCKTON.

PLEADING.—*Can not be Double.*—*Answer.*—*Cross Complaint.*—*Practice.*—

A single pleading can not be both an answer and a cross complaint, but must be classified according to its averments; and, if a pleading is in

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all essential respects a cross complaint, objections to it as an answer raise no question upon it as a cross complaint.

INSTRUCTION.—*Practice.—Evidence.*—Where an instruction gave the law correctly in the abstract, a judgment will not be reversed because of its inapplicability to the evidence, unless such inapplicability was presumably injurious to the party complaining.

From the Tippecanoe Superior Court.

R. C. Gregory, W. B. Gregory and E. A. Greenlee, for appellants.

R. Jones and D. Royse, for appellee.

NIBLACK, J.—Action by Joseph S. Stockton, against James M. Stockton and Mary Stockton, his wife, to enforce a vendor's lien against several tracts of land.

The complaint was in four paragraphs. The first paragraph alleged a sale of an eighty-acre tract of land to the said James M. Stockton, and a conveyance of it, at his request, to the said Mary. The other three paragraphs severally alleged the sales and conveyances of other tracts of land to the said James M. Stockton. Balances were claimed to be due upon all the tracts of land thus sold and conveyed. Mary Stockton answered the first paragraph of the complaint :

First. In general denial ;

Second. Payment in full by her co-defendant ;

Third. By way of answer and cross complaint, averring the existence of an older judgment lien, upon which the land had been sold upon execution, and asking that the plaintiff might be enjoined from prosecuting his suit.

James M. Stockton also answered generally, denying the complaint, and averring payment in full for all the tracts of land purchased by him of the plaintiff. A demurrer was sustained to the cross complaint, otherwise known as the third paragraph of the said Mary Stockton's answer, and a jury to which, after issue joined, the cause was sent for trial, returned a verdict finding balances to be due to the plaintiff upon each paragraph of the complaint.

After considering and overruling a motion for a new trial,

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the court rendered judgment against the defendant James M. Stockton, for the amounts so found to be due, and decreed these several amounts to be liens against the tracts of lands upon which they were respectively due.

It is complained, first, that the court erred in sustaining the demurrer to the cross complaint of Mary Stockton; second, that the court erred in refusing to grant a new trial in the cause.

Counsel for the appellants refer to the cross complaint as a paragraph of the answer of Mary Stockton, and insist upon its sufficiency as an answer. We have repeatedly decided that a single pleading can not be both an answer and a cross complaint, and that every pleading must be classified in accordance with the character which its substantial averments impress upon it. The pleading before us asked for affirmative relief, and was in all its essential features a cross complaint. Arguments, therefore, addressed to its sufficiency as an answer, raise no question upon it as a cross complaint, and establish nothing in support of the alleged error of the court in sustaining a demurrer to it.

Upon the trial the plaintiff introduced some deeds in evidence, to sustain, in part, the allegations of his complaint. These were short form deeds, each purporting to be in consideration of a specified sum of money, but containing no words acknowledging the receipt of the purchase-money.

The material question at the trial was as to whether full payment had been made for the lands described in the deeds which had thus been read in evidence. James M. Stockton testified that he assumed to pay certain debts and liens upon the lands, as the only consideration for their conveyance to him and the said Mary respectively, and that he had paid all of said debts and liens as he had agreed to do.

The plaintiff on his part testified that the payment of such debts and liens constituted only a part of the consideration for which the conveyances were made, and that balances on

Stockton *et ux.* v. Stockton.

the purchase-money were due him upon each tract described in the deeds.

No other witness claimed to have any knowledge of the precise terms upon which the conveyances were made, but circumstances in supposed corroboration were respectively relied upon.

The court, at the request of the plaintiff, instructed the jury as follows: "Gentlemen of the Jury: The deeds of conveyance of certain real estate, from the plaintiff to the defendants, have been read in evidence. I instruct you, as a general proposition of law, that when a deed expresses the consideration, and contains an acknowledgment that the consideration has been paid, as, for example, 'I, A. B., in consideration of the sum of — dollars, the receipt whereof is hereby acknowledged, do hereby convey to C. D. the following real estate,' etc., such words will be *prima facie* evidence that such consideration has been paid, but such *prima facie* evidence may be explained or contradicted. In this case, however, I do not understand that the deeds, which have been read in evidence, contain these [words], or similar words to the same effect. But I give you the foregoing instruction as a general proposition of law, and if said deeds do contain these words, or words to their effect, then the instruction is applicable to this case, and you will take it as the law upon this subject."

Counsel for the appellants claim that this instruction was erroneous, because of its inapplicability to the evidence, and of its consequent tendency to confuse and mislead the jury. The instruction would evidently have been more appropriate to the occasion, if it had given an absolute construction to the language used in the deeds which had been read in evidence, instead of announcing a general principle, applicable only to another class of deeds; but, as an abstract proposition, it gave the law correctly, and we are unable to see that any inference, injurious to the appellants, could reasonably

Kirland v. Stumph et al.

have been drawn from it in the form in which it was given.

A judgment will not be reversed because of the inapplicability of an instruction to the evidence, unless its inapplicability was presumably injurious to the party complaining of it. No sufficient reason has been shown for a reversal of the judgment.

The judgment is affirmed, with costs.

No. 7969.

KIRLAND v. STUMPH ET AL.

SUPERIOR COURT.—*Assignment of Errors.*—*Practice.*—*Supreme Court.*—

Unless error is assigned on the action of the Marion Superior Court at general term, no question is presented to the Supreme Court on appeal.

From the Marion Superior Court.

A. Q. Jones and W. S. Ryan, for appellant.

D. V. Burns and C. S. Denny, for appellees.

FRANKLIN, C.—The appellant commenced three suits against appellees in the Superior Court of Marion County. They were consolidated, tried as one suit by the court, and judgment rendered for appellees.

An appeal was taken to the general term of said court, and by it the judgment at special term was in all things affirmed. An appeal was then taken to this court.

In this court, the appellant has assigned the same errors, and in the same manner, as he assigned them in the general term of the superior court, but has not assigned any error in the superior court at general term. Those errors have

 Foreman v. Beckwith et al.

all been passed upon and decided by the superior court at general term; and that decision is final, unless it is complained of in this court. There being no error assigned on the action of the superior court at general term, there is no question presented by the record for this court to decide.

Acts 1871, p. 48; Buskirk's Practice, 129 and 131; *Wesley v. Milford*, 41 Ind. 413; *Farman v. Ratcliff*, 42 Ind. 537; *Van Dusen v. Kindleburger*, 44 Ind. 282; *Linsman v. Huggins*, 44 Ind. 474; *The Indianapolis, etc., Union v. The Cleveland, etc., R. W. Co.*, 45 Ind. 281; *Buser v. Blair*, 47 Ind. 519; *Munson v. Lock*, 48 Ind. 116; *Miller v. The State, ex rel. Harrington*, 61 Ind. 503; *The Indianapolis, etc., R. W. Co. v. Negley*, 62 Ind. 178; *McLaughlin v. Child*, 62 Ind. 416.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, and the authorities therein cited, that the judgment below be, and is hereby, in all things affirmed, with costs.

 No. 7867.

FOREMAN v. BECKWITH ET AL.

73	515
156	10

CONTRACT.—*When Presumed to be Parol.*—When a contract is not alleged to be in writing, it will be presumed to be by parol.

PROMISSORY NOTE.—*Assignment by Delivery.*—*Defences Permitted to Maker.*—A note payable in a bank in this State is negotiable as an inland bill of exchange, and where the payee assigns such note by delivery merely, the holder has an equitable title, and the right to sue thereon in his own name, by making the payee a party defendant; but such assignment does not cut off any defences which the maker may have as against the payee.

From the Madison Circuit Court.

C. D. Thompson, for appellant.

H. D. Thompson, for appellees.

Foreman v. Beckwith et al.

NEWCOMB, C.—Appellant sued upon a promissory note, executed by the appellee Beckwith, payable to the Madison County Bank, and at that bank. The complaint is in three paragraphs. The first alleges that the bank sold and assigned the note, before due, etc., to one James E. Prewitt, and that the latter endorsed the same to the plaintiff.

The second paragraph states that, at the time Beckwith executed the note, he delivered it to Prewitt, and that Prewitt, before maturity, endorsed it to the plaintiff.

The third paragraph alleges that the Madison County Bank never had any interest in the note; that at its execution it was delivered by the maker to Prewitt, and was by the latter endorsed to the plaintiff. Each paragraph avers that the plaintiff purchased the note before maturity, and for a valuable consideration. The Madison County Bank was made a defendant to answer as to its interest in the note.

An answer in twelve paragraphs was filed by defendant Beckwith. To the first a demurrer was sustained, and demurrers to the remaining eleven were overruled, to which the plaintiff reserved exceptions. The bank answered, admitting the execution of the note, but denying all other allegations of the complaint. Replies were then filed to Beckwith's answers, and the cause was tried by the court resulting in a finding and judgment for the defendants.

The assignments of error relate solely to the rulings of the court below on the demurrers to defendant Beckwith's answers, and the only question discussed in the briefs of counsel is whether the note, in the hands of the plaintiff, is entitled to the immunities of commercial paper.

The case is thus stated in appellant's brief: "The question in the case is, is the note sued on commercial paper and governed by the law merchant? If it is, then the demurrers should have been sustained; but if it is not, then the rulings of the court below on the demurrers were correct."

Foreman v. Beckwith et al.

We are therefore relieved from an examination of the eleven paragraphs of answer.

There was no averment in the complaint that the bank made a written assignment of the note. An assignment may be by delivery merely, and, according to the frequent rulings of this court, where a contract is not alleged to be in writing, the presumption is that it was by parol.

A copy of the note, with Prewitt's endorsement thereon, was filed with the complaint.

The act of March 11th, 1861, concerning promissory notes, bills of exchange, etc., 1 R. S. 1876, p. 635, provides in the 1st section, that all promissory notes, bills of exchange, bonds, and certain other instruments in writing, "shall be negotiable by endorsement thereon, so as to vest the property thereof in each endorsee successively."

Section 6 of the same statute provides, that "Notes payable to order or bearer in a bank in this State, shall be negotiable as inland bills of exchange, and the payees and endorsees thereof may recover, as in case of such bills."

The note in suit was payable in a bank in this State and was therefore negotiable in form. But there was no indorsement of the note by the payee. Assuming, therefore, that the plaintiff was legitimately the owner of the paper, he traced his title from the payee by delivery only; this gave him an equitable title, and the right to institute an action upon it in his own name, by making the payee a party defendant, as provided in section 6 of the code of practice.

Did such parol assignment place the plaintiff in the attitude of a *bona fide* purchaser, so as to cut off defences the maker might have against the payee, or his immediate endorser, Prewitt? The statute, as we have seen, places such notes as the one in question, on the footing of inland bills of exchange. What, then, are the rights of the purchaser of an inland bill, who does not hold the paper by indorsement from or through the payee?

Ruddell *et al.* v. Dillman, Administrator, *et al.*

In Daniel on Negotiable Instruments, section 781, the rule is thus stated: "A bill or note in the hands of one not the payee, and unindorsed, where it is not payable to the payee or bearer, would be open to defences in the hands of the transferee, for such possession and transfer are not in the usual course of business." To the same effect are 1 Parsons Bills and Notes, 278-9; 1 Wait's Actions and Defences, 586; Story on Bills, sec. 201; Edwards on Bills and Notes, 286-7; *Haskell v. Mitchell*, 53 Maine, 468; *Kyle v. Thompson's Adm'r*, 11 Ohio St. 616; *Hedges v. Sealy*, 9 Barb. 214; *Southard v. Porter*, 43 N. H. 379; *Elliott v. Armstrong*, 2 Blackf. 198. In view of these authorities, it is manifest that sections 1 and 6 of the act of 1861 did not preclude the defences set up by the defendant Beckwith, and the ruling of the court below was correct. The judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and is, in all things, hereby affirmed, at the costs of the appellant.

No. 8156.

RUDDELL ET AL. v. DILLMAN, ADM'R, ET AL.

PROMISSORY NOTE.—*Payable in Bank.*—*Fraud in Procuring.*—*Negligence of Maker.*—*Bona Fide Endorsee.*—Where one signs a note negotiable by the law merchant, whether he can read or not, relying on the false and fraudulent representation of the payee, that it was something different from a note, and makes no effort to ascertain its tenor, he is liable thereon to a *bona fide* endorsee for a valuable consideration, who took the note before maturity and without notice of the fraud.

From the Wabash Circuit Court.

A. Taylor, for appellants.

M. H. Kidd and W. G. Hunter, for appellees.

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BICKNELL, C.—This was a suit by the endorsees against the maker and endorsers of a promissory note, payable at a bank in this State, to the order of the payee, negotiable by the statute as an inland bill of exchange, and governed by the law merchant. The original appellee, John Dillman, was the maker of the note; the other appellees were the endorsers. Dillman answered in two paragraphs:

The first was the general denial.

The second was substantially as follows: That Hudson & Dougherty, the payees of the note, came to his residence and proposed to sell him dry goods for fifty cords of wood, and cut the wood themselves, to which Dillman agreed; that the payees then filled blanks in a printed paper and requested him to sign it, telling him it was a contract to deliver fifty cords of wood when called for; that Dillman was old and infirm, blind in one eye and very dim-sighted in the other, unable to see writing or print unless the characters were very large; that he was of weak mind, and wholly uneducated, and could not read writing nor printing unless the printed characters were large; that he could not read the paper they presented to him, and that, relying on said statement of the payees as to the contents of said paper, and believing said statement to be true, he wrote his name on said paper, where they directed him to write it, believing it to be a contract to deliver fifty cords of wood, and being wholly ignorant that he was signing a note; that the name on the note sued on is his signature, obtained by the said fraudulent representations; that, for the foregoing reasons, he could not ascertain the true character of the paper, and was compelled to rely on the said statement and representations of the payees. Wherefore he says that he never executed said note.

Each of said paragraphs of answer was duly sworn to by Dillman.

The appellants demurred to said second paragraph, for want of sufficient facts; the demurrer was overruled; a re-

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ply was filed in denial of said second paragraph ; the issues were tried by a jury and a verdict was returned in favor of Dillman, the maker of the note, and against his co-defendants, the endorsers ; the appellants moved for a new trial as against the appellee Dillman.

The first three reasons for a new trial allege improper admissions of testimony on behalf of Dillman. The fourth reason alleges error of the court in permitting the jury to amend the form of their verdict. The fifth and sixth reasons allege, respectively, that the verdict was not sustained by sufficient evidence, and is contrary to law. The errors assigned here are :

First. That the court erred in overruling the demurrer to the second paragraph of Dillman's answer.

Second. That the court erred in overruling the motion for a new trial.

After the assignment of errors, the appellee John Dillman died, and Abraham Dillman, his administrator, was substituted as appellee in his stead.

The case of *Maxwell v. Morehart*, 66 Ind. 301, is decisive of this case. There, the action was by endorsers against the maker of commercial paper ; the answer was the general denial and a second paragraph ; a demurrer to the second paragraph was overruled ; a reply was filed in denial ; the issues were tried by a jury ; the verdict, as in this case, was in favor of the maker of the note, and, on the appeal, the same errors were assigned as in this case. Morehart's answer alleged that the payee of the note came to his house and proposed to appoint him an agent to sell patented churns ; that he accepted the agency ; that nothing was said about a promissory note ; that, if there was any note in the paper signed by him, he did not know it, and could not, by reasonable diligence, have discovered it ; that he was a farmer, not accustomed to trade in patents ; that his eyesight was defective ; that he could not read without specta-

Ruddell *et al.* v. Dillman, Administrator, *et al.*

cles, and had no spectacles, and merely signed his name at the place pointed out by the payee; that, if his signature was on said note, it was obtained by fraud, which he could not have prevented by the use of due diligence.

This court held that the demurrer to the foregoing paragraph ought to have been sustained, and Howk, J., delivering the opinion of the court, said that the appellee was a witness for himself at the trial, and testified substantially to the same facts stated in the second paragraph of his answer. If those facts were a sufficient defence, it might be said there was evidence in the record tending to sustain the verdict, and we could not disturb it; so that the only question for our decision is, are such facts a valid defence to the action. All this is true of the present case.

The court further said that it can not be questioned that the appellee, upon the facts stated in the second paragraph of his answer, was guilty of negligence in failing to use reasonable care to inform himself of the character and contents of the instrument he executed, and in such a case, having executed a note negotiable as an inland bill of exchange, he must be held liable to the endorsees thereof, before maturity, in good faith, without notice and for a valuable consideration. To the same effect are the following recent decisions: *Indiana National Bank v. Weckerly*, 67 Ind. 345; *Kimble v. Christie*, 55 Ind. 140; *Fisher v. Von Behren*, 70 Ind. 19; *Nebeker v. Cutsinger*, 48 Ind. 436; *Ruddell v. Fhalor*, 72 Ind. 533. The rule established in these cases is, that when a man, whether he can read or not, signs a note, negotiable according to the law merchant, relying on the false and fraudulent representations of the payee, that it is something different from a note, and making no reasonable effort to ascertain the tenor of it, he is liable thereupon to a *bona fide* holder, for a valuable consideration, who took the note before maturity, and without notice of the fraud.

The court below erred in overruling the appellants' demur-

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rer to the second paragraph of John Dillman's answer, and in overruling the motion for a new trial. The appellant concedes that the judgment as to the endorsers was right. The judgment of the court below in favor of the appellee Dillman ought to be reversed, and a new trial ordered as to his administrator.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things reversed, as to the said appellee Abraham Dillman, administrator, at his costs, and this cause is remanded for a new trial as to the said Abraham Dillman, administrator.

No. 7458.

HIGGINS ET AL. v. KENDALL.

PRACTICE.—*Appeal.*—*Sufficiency of Complaint.*—*Assignment of Error.*—

The sufficiency of the facts averred in a complaint, as a whole, may be questioned in the Supreme Court for the first time, and an assignment of error, that "neither paragraph of the complaint states facts sufficient to constitute a cause of action, when separately considered," is a proper assignment of error.

VENDOR'S LIEN.—*Rights of subsequent Purchaser who has not Paid all of Purchase-Money.*—A vendor may enforce his lien against a subsequent purchaser with notice of the lien, or against one without notice, to the extent of the purchase price unpaid by him, at the time he receives notice of the vendor's claim.

PRACTICE.—*New Trial.*—When the motion for a new trial is not filed within the term at which the verdict was rendered, no error can be assigned thereon in the Supreme Court.

SAME.—*General Verdict.*—*Answers to Interrogatories.*—*Erroneous Decree.*—*Failure to take Exception.*—A general verdict will not be controlled by answers to interrogatories, if reconcilable therewith upon any supposable state of facts that might be proved under the pleadings and issues in the case. Where no exception has been taken to a decree rendered, and no motion made for its modification, the question of the correctness of such decree can not be raised in the Supreme Court.

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Higgins *et al.* v. Kendall.

From the Shelby Circuit Court.

A. Blair, E. P. Ferris, A. F. Wray and W. W. Spencer,
for appellants.

T. B. Adams and L. T. Michener, for appellee.

WOODS, J.—Suit by the appellee against the appellants, to enforce a vendor's lien and to recover judgment upon a promissory note made by the appellant Samuel Higgins. The original complaint was against said Samuel and his wife and co-appellant, Rebecca, but on leave of the court an "additional complaint," in two paragraphs, was filed, wherein said Martin, who had purchased the land upon which the lien was claimed, was made a party defendant, and, issues of fact having been joined upon the complaint, the plaintiff thereafter filed a supplemental complaint, in one paragraph, to which the defendants filed joint and separate answers. Trial by jury; general verdict and answers to interrogatories; judgment and decree for the plaintiff, as prayed.

The appellant Martin alone assigns error, to wit, as follows:

1. Because the court erred in overruling his motion for a judgment on the verdict of the jury and the answers to the interrogatories.

2. Because the court erred in overruling his motion for a new trial.

3. Because the court erred in rendering judgment against him, there being no verdict on which such judgment could be rendered.

4. Because neither paragraph of the complaint states facts sufficient to constitute a cause of action, when separately considered.

We will dispose of the last assignment first. No demurrer was filed to the complaint nor to any paragraph thereof. The sufficiency of the facts averred in a complaint as a whole may be brought in question here by an assignment of

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error thereon, but the sufficiency of single paragraphs can not be separately questioned in that way. That is to say, the assignment of error must be upon the whole complaint; but, when so challenged, the complaint will be upheld if any one paragraph is good, or so far good as to come within the rule that defective averments may be deemed cured by the verdict. It is not meant, however, that when error is assigned upon a complaint consisting of several paragraphs, the complaint will be treated as a unit and upheld if all the paragraphs contain facts sufficient to constitute a cause of action. There must be one good paragraph, when considered by itself, or the error will be deemed well assigned. The assignment under consideration is good, because it puts directly in issue the sufficiency of the whole complaint, considered with reference to each paragraph, which is the exact mode in which it must be considered, whatever form of assignment may be adopted. On this subject see the following cases: *Caress v. Foster*, 62 Ind. 145; *Smith v. Freeman*, 71 Ind. 85; *The Pittsburgh, etc., R. W. Co. v. Hunt*, 71 Ind. 229.

Indeed, where the complaint contains more than one paragraph, instead of saying that the complaint does not state facts sufficient, etc., it would seem to be a more appropriate formula for the assignment to say: "That no paragraph of the complaint states facts sufficient to constitute a cause of action." Such an assignment presents an accurate statement of the exact question which must be passed upon; while an assignment upon the complaint as a whole does not present the question directly, but only argumentatively, and the argument leads directly to the formula suggested; that is to say, in this wise: "The complaint does not state facts sufficient to constitute a cause of action," *because*, "No paragraph of the complaint states facts sufficient to constitute a cause of action."

However, the objections advanced to the several para-

Higgins *et al.* v. Kendall.

graphs of the complaint before us are not well made. Each paragraph shows that the note sued on was given for a part of the price of the land; that no security was taken; that the maker was insolvent; that the land had been conveyed to said Martin, one paragraph averring that he took with actual notice, another that he took with notice, and for the purpose of aiding said Samuel in cheating the plaintiff out of his claim, and another, that there remained "due, and to become due, from Martin Higgins to said Samuel Higgins, a large balance, to wit, \$7,000, of the amount which said Martin Higgins agreed to pay as the price of said land." These averments were clearly sufficient to make the respective paragraphs, in which they are found, good as against said Martin, and there is no claim of defect in any other respect. That the vendor may enforce his lien against a subsequent purchaser, without notice, who has not paid the full purchase price, saving the purchaser's rights to the extent of the part of the price paid before he received notice of the first vendor's claim, is well settled by authority, and is manifestly in accordance with the principles of equity and good conscience. *Amory v. Reilly*, 9 Ind. 490; *Merritt v. Wells*, 18 Ind. 171; *Walker v. Cox*, 25 Ind. 271; *Crowfoot v. Zink*, 30 Ind. 446; Story Eq., secs. 1217, 1219; 4 Kent Com. 152; 2 Sugden Vendors, 8th Am. ed., bottom p. 671, note *d*; 1 Perry Trusts, secs. 232, 239; *Rhodes v. Green*, 36 Ind. 7; *Mackreth v. Symmons*, 15 Ves. 329; S. C., 1 Lead. Cas. Eq., pt. 1, side p. 289.

The motion for a new trial was not filed within the time prescribed by the statute, that is to say, at the term of court at which the verdict was rendered. 1 R. S. 1876, p. 183, sec. 354. There is therefore no question before us in reference to that motion and the causes therein stated for a new trial, including the instructions of the court to the jury and the inquiry whether the verdict is according to the law and the evidence.

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This leaves to be considered only the first and third assignments of error.

The verdict and answers to interrogatories, each signed by the foreman of the jury were as follows: "We, the jury, find for the plaintiff, as against Samuel Higgins, in the sum of \$429¹⁴/₁₀₀, and that plaintiff is entitled to a vendor's lien on the land mentioned in the complaint for said sum, as against Martin Higgins and Samuel Higgins.

"Question 1st. Did Samuel Higgins and wife convey to Martin Higgins the lands set out in the first paragraph of the complaint, on the 16th day of September, 1876? Answer. Yes.

"Ques. 2d. When Martin Higgins purchased the land of Samuel Higgins, did Martin Higgins know that the plaintiff's claim was for purchase-money and was unpaid. Ans. No.

"Ques. 3d. Did Martin Higgins receive notice of the plaintiff's claim before he paid Samuel Higgins all of the purchase-money for the real estate, and, if so, what amount remained unpaid when he received such notice. Ans. Yes; \$41.50.

It is manifest that the court committed no error in overruling the motion of the appellant for judgment in his favor. The general verdict is informal, but in terms is distinctly in favor of the plaintiff, as against Samuel and Martin Higgins. No objection having been made to it, upon motion for a *venire de novo*, or otherwise, the court was warranted in entering a decree thereon against said defendants. There is nothing in the special findings necessarily inconsistent with this conclusion; for, while it is found that Martin Higgins had no notice of the plaintiff's right to a lien when he purchased the land, and that he did have notice before he had paid all the purchase-money, to wit, \$41.50, it is not found what the purchase price was which he agreed to pay or perform. The sum unpaid at the time of the notice, for all that is found, may have been the whole price, or, if not the whole price, yet all that was payable in money; while

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the remainder may have been yet to be performed or discharged by the delivery or conveyance of other property, or in some other supposable manner. The rule is, and has been repeatedly declared, that the general verdict shall not be controlled by the answers to interrogatories, if reconcilable therewith upon any supposable state of facts provable under the pleadings and issues in the case.

Counsel for the appellant insist, however, that the decree should have gone against him for the sum of \$41.50 only, that is to say, for the amount of the purchase-money found to have been unpaid when he received notice of the plaintiff's right to a lien. This position is overthrown by what we have already said; but, if it were conceded that the lien of the plaintiff should have been enforced for that sum only against the land in the hands of the appellant, the proper steps were not taken to save and present the question. The appellant took no exception to the decree as rendered, and made no motion for a modification. To the extent of said sum of \$41.50 at least the decree was right, and it was erroneous, if at all, only in declaring the lien for a greater sum. The appellant should have excepted to the amount of the decree as too great, or should have moved for a reduction of the amount to the proper sum, and saved an exception to the ruling on that motion if adverse.

The judgment of the circuit court is affirmed, with costs.

No. 9337.

MARTIN v. THE STATE.

CRIMINAL LAW.—Indictment.—Supreme Court.—Practice.—Where an indictment is apparently good, and no objection thereto is pointed out, the Supreme Court will not consider assignments of error based on the overruling of a motion to quash such indictment, or the overruling of a motion in arrest of judgment.

Howard v. The State.

From the Cass Circuit Court.

J. W. McGreevy, for appellant.

D. P. Baldwin, Attorney General, and *E. S. Daniels*, Prosecuting Attorney, for the State.

WORDEN, J.—The appellant was indicted in the court below for an assault and battery upon Zenas S. Barnett, with intent then and there, thereby, purposely, feloniously and with premeditated malice, to kill and murder the said Barnett. On trial the defendant was convicted, and he was adjudged to pay a fine of \$25 and to be imprisoned in the state-prison for the period of four years.

The following errors are assigned :

“1st. The court erred in overruling the appellant’s motion to quash the indictment herein.

“2d. The court erred in overruling the appellant’s motion for a new trial.

“3d. The court erred in overruling appellant’s motion in arrest of judgment.”

The indictment seems to us to have been good, and, as no objection to it has been pointed out, we need not take any further notice of the first and third assignments of error. The only ground upon which it is urged that a new trial should have been granted is that the evidence was not sufficient to sustain the verdict. We have examined the evidence carefully, and have concluded that the case is not one that calls for the interference of this court.

The judgment below is affirmed, with costs.

No. 8739.

HOWARD v. THE STATE.

PRACTICE.—*Supreme Court.—Record.*—Where the only error assigned is upon the overruling of a motion for a new trial, and the evidence is not

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in the record, but there is a bill of exceptions therein showing the instructions given by the court, both oral and written, but not showing that any exception was taken at the time to the giving of either, no question is presented for the decision of the Supreme Court.

From the Clark Circuit Court.

J. B. Meriwether, for appellant.

D. P. Baldwin, Attorney General, and *W. W. Thornton*, for the State.

WOODS, J.—The appellant was indicted, convicted, and sentenced to the state-prison for four years, upon a charge of assault and battery with intent to commit a rape. Error is assigned only upon the overruling of the motion for a new trial. The evidence is not in the record. There is a bill of exceptions showing the written instructions of the court to the jury, and that the court repeated orally to the jury the substance of one of the written charges. The bill also shows that the court, before the commencement of the argument, was requested by the appellant to give its instructions in writing. It does not appear that any exception was taken to any of the instructions, written or oral, and it is expressly stated in the bill of exceptions, that “said verbal repetition was not excepted to at the time.” The record presents no question for decision.

The judgment is affirmed, with costs.

No. 9146.

PALMER ET AL. v. GLOVER.

JUDGMENT.—*Action on.*—A judgment is a debt of record, and an action may be maintained thereon for the recovery of such debt, although the judgment plaintiff therein could enforce its collection by execution issued out of the court in which it was rendered.

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SAME.—Costs.—Interest.—A judgment for costs is a “judgment for money,” within the meaning of the act of March 10th, 1879, concerning interest, etc., Acts 1879, p. 43, and bears interest from the date of the return of the verdict or finding of the court, until the same shall be satisfied, and a judgment plaintiff is entitled to recover for such costs, with interest thereon, in an action upon his judgment.

SAME.—Entry of Costs in Order Book.—It is not necessary that the entry of a judgment on the order book should specify the amount of the costs recovered.

SAME.—Fee Book.—Record.—Evidence.—The fee book of the clerk of the circuit court is a public record, and judgment defendants are bound by the lawful entries of such clerk against them therein, and it is competent evidence of the amount of costs due the judgment plaintiff in an action on his judgment.

SAME.—Fee Bill.—Fees and Salaries.—The provisions of section 39 of the fee and salary act of March 12th, 1875, in relation to actions on fee bills, 1 R. S. 1876, p. 478, are not applicable to a suit upon a judgment, and for the costs recovered therein. *Query*, whether the fee and salary act of March 31st, 1879, Acts 1879, p. 130, does not repeal section 39, *supra*.

SAME.—Collateral Attack.—Parol Evidence.—Taxation of Costs.—If the costs, or any of the items thereof, were illegal charges against the judgment defendant, he might have had a taxation of the costs, by a motion for that purpose, in the original cause, but could not, in an action on the judgment therein, impeach the judgment for costs by parol evidence.

SUPREME COURT.—Weight of Evidence.—Finding.—The Supreme Court will not disturb a finding on the mere weight of evidence, where the evidence tends to support it.

From the Lawrence Circuit Court.

G. W. Friedley and *E. D. Pearson*, for appellants.

M. T. Dunn and — *Dunn*, for appellee.

Howk, C. J.—In this action the appellee sued the appellants upon a judgment which he had recovered of and from them on the 30th day of March, 1877, by the consideration of the court below. This suit was commenced on the 24th day of September, 1880. The appellants jointly answered the appellee's complaint by a general denial thereof. A trial of the cause by the court resulted in a finding for the appellee in the sum of \$1,611.95, and over the appellants' motion

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for a new trial, and their exception saved, judgment was rendered on the finding.

In their brief of this cause, the appellants' counsel say : "The errors we will insist upon arise on a motion for a new trial, and for the specific reasons that the finding and judgment are contrary to the evidence, are excessive and contrary to law, and are not sustained by sufficient evidence."

In *Gould v. Hayden*, 63 Ind. 443, it was said by this court : "A judgment is a 'debt of record ;' and, whether foreign or domestic, an action may be maintained thereon for the recovery of such debt, even where it might appear that the judgment plaintiff could enforce the collection of his judgment by an execution issued out of the court in which it was rendered. *Davidson v. Nebaker*, 21 Ind. 334. The judgment plaintiff, of course, controls his judgment. He may enforce its collection by the process of the court in which he obtained his judgment, or he may, if he may elect so to do, use his judgment as an original cause of action, and bring suit thereon in the same or some other court of competent jurisdiction, and prosecute such suit to final judgment."

The point made by the appellants' counsel, "that appellee's right of action is a bare technicality of questionable policy," is not well founded ; and certainly he can not, under the law, be "called upon to give any reason or cause for bringing this suit, when he already had a judgment."

It is claimed by the appellants' counsel that the damages assessed by the court were excessive, in this, that they were assessed at the sum of \$3.90 in excess of the aggregate amount of the original judgment debt, and of the interest accrued thereon, and of the costs taxed on the original judgment at \$34.30, without interest thereon. This point is well taken, if it can be correctly said that the appellee was not entitled to recover interest on his judgment for costs ; but if the appellee was entitled by law, as we think he was, to recover interest on his judgment for costs, then the damages assessed by

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the court, instead of being excessive, were not enough by the sum of \$3.42. In section 2 of "An act concerning interest and usury," approved March 10th, 1879, it is provided as follows: "Interest on judgments for money, hereafter rendered, shall be from the date of the return of the verdict or finding of the court, until the same shall be satisfied, at the rate per cent. agreed upon by the parties in the original contract, not exceeding six per cent., and if there is no contract by the parties, at the rate of six dollars a year on one hundred dollars." Acts 1879, p. 43.

This is substantially a re-enactment of section 3 of the act of March 7th, 1861, "regulating interest on money," etc. 1 R. S. 1876, p. 600. The only material difference between the two sections is, that, under the older law, "judgments for money" bore interest from the date of signing the same; while under the law now in force such judgments bear interest "from the date of the return of the verdict or finding of the court." It is settled by the decisions of this court, that "the costs recovered by the judgment are due to the judgment plaintiff, and it is his right to control and receive the money so recovered;" and that "a judgment in favor of a party for costs is, therefore, as much his own property and under his own control as a judgment for a debt sued for." *Armsworth v. Scotten*, 29 Ind. 495; *Hays v. Boyer*, 59 Ind. 341; *Miller v. The State, ex rel.*, 61 Ind. 503; and *Goodwin v. Smith*, 68 Ind. 301.

If a judgment for costs is a "judgment for money," and it surely is, then, by the express terms of the statute, it bears interest "from the date of the return of the verdict or finding of the court, until the same shall be satisfied;" and the judgment plaintiff, in an action upon his judgment, is as much entitled to recover interest upon his judgment for costs as he is upon his judgment debt. We are of the opinion, therefore, that the appellee's damages, assessed by the court, were not excessive, as claimed by the appellants, but that,

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on the contrary, they were not enough ; and of such an error, in the assessment of the amount of the recovery, the appellants do not complain.

But the appellants' counsel insist that the appellee had no right to recover said \$34.30 costs, because, at the time of the rendition of the judgment, the costs had not been taxed, and the entry of the judgment did not contain any specific amount of costs. The form of the entry was, that the appellee recover from the appellants a certain sum of money, "and his costs and charges by him in and about this suit laid out and expended." Counsel think that this entry of the judgment for costs was not sufficient, but we think it contained all that was necessary. We know of no law which requires that the entry of a judgment on the order book should specify the amount of the costs recovered. But counsel say that "the fee book offered in evidence was but an *ex parte* statement of the clerk, to which the appellants were not parties." The fee book is a public record, which the clerk is required by law to keep in his office, and to tax and charge therein the fees and costs in each and every suit in the court of which he is clerk, and his entries in the fee book are no more his *ex parte* statements than are his entries in the order book, or any other record of his office. Judgment defendants are bound by the lawful entries of the clerk against them in the fee book, and they will, at least, act wisely if they take notice of their contents.

The appellants' counsel also insist that the appellee ought not to recover the costs in the original judgment, because of the provisions of section 39 of the fee and salary act of March 12th, 1875. This section provides that "No action shall be maintained on any fee bill, due to any person, so long as the party owing the same shall reside within the jurisdiction of the court issuing the same." 1 R. S. 1876, p. 478. This section does not seem to have been re-enacted, either in form or substance, in the fee and salary act of March

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31st, 1879, and it might well be doubted if the later act did not repeal the section above quoted. But, whether the section is repealed or not, it is certain, we think, that its provisions are not applicable to the case now before us ; for this is, in no proper sense, an action upon a fee bill. In legal parlance, a fee bill is a writ issued against a party making costs, which he has not paid, and this writ may issue against such party, without regard to any judgment for costs, which had been or might be rendered therefor, either for or against such party.

Several objections are made by the appellants' counsel to the costs, and to different items of costs, which we need not stop to consider. The fee book was a record of the court, and, as such, it was competent evidence ; and it proved the amount of costs due the appellee in the original judgment, in accordance with the finding of the court. If the costs, or any of the items thereof, were improper or illegal charges against the appellants, they might have had a taxation of the costs, by a motion for that purpose, in the original case, but they could not, we think, on the trial of the case at bar, impeach the judgment for costs, in whole or in part, by the introduction of parol evidence.

Finally, it is urged by the appellants' counsel that the evidence on the trial was incomplete, because it did not appear that the files in the original suit had been given in evidence. On this point, it is enough for us to say that the evidence in the record tended strongly to sustain the finding of the court on every material question involved in the issues. In such a case, we can not disturb the finding of the court, on the weight of the evidence. When the entry of the judgment on the order book was offered in evidence, the only objection to its admission, pointed out by the appellants, was that no evidence had been offered or proposed, showing that the judgment offered was against them, or in favor of the appellee. They have abandoned this objection, as they had

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the right to do, in this court, but they can not here insist upon an objection to the evidence, which they failed to make in the trial court. The motion for a new trial was correctly overruled. We find no error in the record.

The judgment is affirmed, at the appellants' costs.

No. 8715.

THE STATE v. CORLL.

LIQUOR LAW.—*Sales Without License.*—*Quantity Sold.*—*Pleading.*—*Indictment.*—*Information.*—*Case Overruled.*—Section 12 of the act of March 17th, 1875, to license the sale of intoxicating liquor, 1 R. S. 1876, p. 869, creates two distinct offences as to retailing without a license: selling less than a quart at a time, without reference to the place where it is to be drank; and selling in any quantity to be drank or suffered to be drank on the premises where sold. And, in a prosecution under the first branch of such section, the indictment or affidavit and information must aver that the quantity sold was less than a quart, unless it is averred that it was sold to be drank on the premises, but in a prosecution under the second branch the quantity sold is immaterial. *The State v. Zeitler*, 63 Ind. 441, overruled, so far as it is in conflict with this decision.

From the Wabash Circuit Court.

D. P. Baldwin, Attorney General, *M. Good*, Prosecuting Attorney, *O. H. Bogue* and *W. W. Thornton*, for the State.
A. Hess, for appellee.

WORDEN, J.—Affidavit and information against the appellee for retailing without a license. On motion of the appellee, the affidavit and information were quashed, and the State excepted. This ruling of the court is assigned for error.

The affidavit, made by Elam Robbins, stated that "on or about the 1st day of January, A. D. 1880, at the county of Wabash and State of Indiana, one George W. Corll unlaw-

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fully sold to said Robbins one gill of intoxicating liquor, to be drank, and suffered to be drank in the house of said Corll, where the same was so sold, to wit, one gill of intoxicating liquor, called whiskey, at and for the price of ten cents in money, he, the said Corll, not being then and there licensed to sell intoxicating liquor to be drunk or suffered to be drunk in said house, contrary," etc.

The information followed the affidavit.

The objection urged to the affidavit and information is that they do not allege that the quantity of liquor sold was less than a quart.

This objection is not well taken. The 12th section of the act of March 17th, 1875, 1 R. S. 1876, p. 869, provides that "Any person not being licensed according to the provisions of this act, who shall sell or barter, directly or indirectly, any spirituous, vinous or malt liquors in a less quantity than a quart at a time, or who shall sell or barter any spirituous, vinous or malt liquors to be drank or suffered to be drank in his house, out-house, yard, garden, or the appurtenances thereto belonging, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined," etc.

This section creates two distinct offences: The first branch makes it an offence to sell or barter, without a license, spirituous, etc., liquors, in a less quantity than a quart at a time, without reference to the place where they are to be drank. In a prosecution under the first branch of the section, that is, where it is not averred that the liquors were to be drank, or were suffered to be drank, in the house, etc., the indictment or affidavit and information must show that the quantity sold was less than a quart. See *Arbintrode v. The State*, 67 Ind. 267, and subsequent cases following it. But, under the second branch of the section, the quantity sold is entirely immaterial. The object of the second branch was to prohibit the barter or sale of such liquors in any quantity, great or small, to be drank, or suffered to be drank, in the

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house, etc., without a license. *Schlicht v. The State*, 56 Ind. 173; *Plunkett v. The State*, 69 Ind. 68.

The averments in the affidavit and information brought the case within the second branch of the section of the statute above quoted; and there was no need, therefore, that they should show that the quantity sold was less than a quart.

If there is anything in the case of *The State v. Zeitler*, 63 Ind. 441, which is in conflict with the foregoing view, it must be to that extent overruled.

We are of opinion that the court below erred in quashing the affidavit and information.

The judgment below quashing the affidavit and information is reversed, with costs, and the cause remanded for further proceedings.

No. 8885.

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CRIMINAL LAW.—*Empanelling Grand Jury.*—*Venire.*—*Statute Construed.*

—*Indictment.*—*Abatement.*—The inhibition contained in the act of March 10th, 1873, 2 R. S. 1876, p. 418, against the clerk issuing, without an order of the judge, a *venire* for the attendance of grand jurors, already properly chosen by the county board, constitutes no restriction on the power of the court to organize the panel from those found in attendance, though they have come in response to a summons issued without the required order; and, where a grand jury is thus organized, it is not, for that reason, illegal, and a plea in abatement by a defendant to an indictment returned by such jury against him was properly overruled.

SAME.—*Forgery.*—*Lost Instrument.*—*Pleading.*—It is not necessary, in an indictment for forgery, where the instrument forged is alleged to be lost, to show that search therefor had been made by the parties to whom it was uttered.

SAME.—*Description.*—Where the indictment describes the lost note as purporting to be signed by "one Henry Wintrobe or Henry R. Wintrobe," such description is not uncertain or equivocal.

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From the Huntington Circuit Court.

J. J. Dille and *J. B. Kenner*, for appellant.

D. P. Baldwin, Attorney General, *C. W. Watkins*, Prosecuting Attorney, and *A. Moore*, for the State.

WOODS, J.—The appellant was indicted, convicted and sentenced to the state-prison for two years on a charge of forgery. The assignments of error are: (1) That the court erred in sustaining the demurrer of the State to the appellant's plea in abatement; (2) the court erred in overruling the motion of the appellant to quash the indictment; (3) the court erred in overruling the motion in arrest of judgment.

The overruling of the motion for a new trial is also assigned, but the evidence adduced on the trial is not in the record. Counsel for the appellant concede that no question is saved in respect to this ruling. We may observe here that the record does not show that the motion in arrest of judgment was overruled, nor, indeed, that such a motion was filed. Immediately following the entry of judgment against the appellant, there is set forth in the transcript a copy of a motion, entitled in the cause, to arrest the judgment, but the record contains no statement, or recital, or copy of the clerk's indorsement of the filing thereof, and there is nothing at all to show any action of the court on the motion.

Omitting some formalities and superfluous words, the indictment, which on the face of the record appears to have been duly found and returned into court, June 8th, 1880, was as follows: The grand jurors of the county of Huntington, and State of Indiana, etc., on their oath present that Henry Hess, late of said county, on the 12th day of February, 1878, at, etc., did then and there feloniously, falsely and fraudulently utter, publish and put off as true and genuine, to Enos T. Taylor, a certain false, forged and counterfeit promissory note, for the payment of money, purporting to have been made by one Daniel Wintrode and one Henry

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Wintrode or Henry R. Wintrode, to the order of one William Fullhart, which promissory note can not be particularly described for the reason that it is lost, and the State of Indiana, by her officers and agents duly authorized on that behalf, after diligent search therefor, can not find the same, which note was substantially as follows: Dated August 5th, 1877, payable to the order of William Fullhart in twelve months after date, calling for the sum of ninety-eight dollars, signed by the names of Daniel Wintrode and Henry Wintrode or Henry R. Wintrode, as makers, which note at the time it was negotiated, was endorsed by defendant, and by and with the name "William Fullhart," which note had divers other words and figures which can not be set out herein for the reason above stated, with intent, then and there and thereby, feloniously and fraudulently to damage and defraud him, the said Enos T. Taylor, to whom then and there said note was so uttered, published and put off, and who then and there acted for and in behalf of himself and Frederick Dick, the said Enos T. Taylor and Frederick Dick then and there being jointly interested in said transaction of said Enos T. Taylor with said defendant, he, the said Henry Hess, at the time he so uttered, published and put off said promissory note, as aforesaid, well knowing the same to be false, forged and counterfeit; that ever since defendant committed said offence he has been absent from the State, contrary, etc. Signed by the prosecuting attorney, and properly numbered, endorsed and filed.

Before arraignment, and before taking any other step, save procuring an assignment of counsel, the defendant filed a sworn plea in abatement, alleging, in substance, that the grand jury, naming them, who sat as the grand jury for the present term, 1880, of the court, and who returned the indictment, were not a legal grand jury, called and empannelled according to law; that, except two, who are talesmen, they were drawn by the board of commissioners of the coun-

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ty, at their March term, 1880, as the proper grand jury for said June term, 1880, but said jury came into court at this present June term and were empanelled and sat without an order having been made by the court or the judge thereof, prior to or since said term began ; no order was made to the clerk of the court to issue a *venire* to the then legal grand jury, stating therein the day the jury should appear, as required by law, but they came, as aforesaid, upon the *venire* of the clerk, and, after being empanelled as above stated, returned the said indictment against this defendant; that the defendant, upon a preliminary examination, had been committed to jail in default of bail, and has been ever since confined, for the period of two weeks, in the jail of this county, is poor, has no means to employ counsel, and though, upon request, he had counsel at said preliminary hearing, he has not been able to employ counsel since, and can not unless the court appoint counsel for him, and on this account, and from the fact that he was not brought out of jail when the said jury was empanelled, and had no means of knowing of the absence of an order concerning the grand jury, he has been unable to challenge said jury before the empanelling thereof. He pleads this his plea in abatement, and prays, etc.

By an act approved March 10th, 1873, which was in force when this indictment was found, it was enacted : “Sec. 1. That hereafter no grand jury shall be summoned to appear at any term of a circuit court unless as provided in this act ;” and, “Sec. 2. That whenever the judge of a circuit court shall deem it necessary that a grand jury shall sit in any county of his circuit, it shall be his duty to make an order requiring the clerk to issue a *venire* for such jury to appear, on such day as may be named in the order, and such *venire* shall be for the jury drawn and selected for the term, as is now provided by law : *Provided*, That the grand jury shall be convened at least twice in every year in each county.” 2 R. S. 1876, p. 418.

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An examination of the plea under consideration will show that the sole and entire ground on which it is claimed that the jury was illegal, which found the indictment against the appellant, is, that the clerk issued the *venire* for the attendance of the jury at the term when the indictment was returned, without an order from the judge therefor.

In the act of March 4th, 1852, concerning grand juries, is the following provision, which was also in force when this indictment was returned, namely: "Sec. 12. No plea in abatement, or other objection shall be taken to any grand jury duly charged and sworn, for any alleged irregularity in their selection, unless such irregularity, in the opinion of the court, amounts to corruption, in which case such plea or objection shall be received." 2 R. S. 1876, p. 419.

Nothing but an irregularity was shown in this case, and that of little or no significance, as affecting the rights of the accused. Whether issued with or without the order of the judge, the *venire* must have been for the same men who were summoned, and who had been, as the plea expressly admits, already properly chosen by the county board. The jurors, except two, having appeared in response to the *venire*, the court recognized and adopted the act of the clerk, and ordered the panel filled from the bystanders, as under section 10 of the act last referred to it was competent to do, and this panel was duly charged and sworn. The 3d section of said act of March 10th, 1873, gives the court a discretionary power to declare the grand jury adjourned; and while sections 1 and 2 are mandatory in the form of expression used, it is manifest that the main, if not the only, purpose of the entire enactment, was to prevent the expense of frequent and prolonged sessions of the grand jury, and to impose upon the judge the sole responsibility in that respect. But the inhibition against the clerk issuing, without an order of the judge, a *venire* for the attendance of the jurors, constitutes no restriction on the power of the

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court to organize the panel, if found in attendance, though they have come in response to a summons issued without the prescribed order therefor. If the objection had been made before the jury was charged and sworn, it must have been overruled as trivial; and so it is immaterial what excuse the defendant has made for not having challenged the array before they were charged and sworn.

The objections made to the indictment are: 1. That it does not show diligence and absence of negligence on the part of the State, in connection with the alleged loss of the forged instrument, it not being shown that search therefor had been made by Taylor and Dick, to whom it had been uttered; 2. That the description of the note is meagre, and is made uncertain and equivocal by the averment that it purported to be made by "Daniel Wintrode and one Henry Wintrode or Henry R. Wintrode."

We do not think these objections are well taken. The note was sufficiently well described, and the use of the expression "one Henry Wintrode or Henry R. Wintrode" introduces no uncertainty. It does not mean that the note purported to be signed by Henry Wintrode, or, if not by him, then by Henry R. Wintrode. The introduction of the word *one* makes the meaning this, namely, that "the note purported to be signed by Daniel Wintrode and one who signed either by the name of Henry Wintrode or Henry R. Wintrode," and, it being shown that the note was lost, it is in substance the same as if, in this immediate connection, it were averred that it was unknown to the grand jury whether that name was signed in one way or the other. It is not left in doubt whether the note purported to be signed by one person or another, but simply whether the name was signed with or without the middle letter "R." See *Choen v. The State*, 52 Ind. 347; *Miller v. The State*, 69 Ind. 284; *The People v. Badgley*, 16 Wend. 53; *Wallace v. The People*,

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27 Ill. 44 ; *The Commonwealth v. Spilman*, 124 Mass. 327 ; S. C., 26 Am. Rep. 668 ; 2 Bishop Crim. Proced., sec. 404, and cases cited.

The judgment is affirmed, with costs.

No. 9040.

BROCAW ET AL. v. THE BOARD OF COMMISSIONERS OF GIBSON COUNTY ET AL.

RAILROAD.—*Practice.—Collateral Questions.*—In a proceeding to enjoin the collection of a tax levied for the construction of a railroad, it is not competent to inquire into questions pertaining to the organization of the railroad company, they having been determined by the board of commissioners as jurisdictional matters.

SAME.—*Appropriation in Aid of.—Limit of Tax.*—In a proceeding for an appropriation to aid in the construction of a railroad through a township, under the act of May 12th. 1869, 1 R. S. 1876, p. 736, only two per centum of the assessed value of the taxable property of the township, as shown by the tax duplicate of the preceding year, can be levied at one time, upon one petition and in any one period of two years; but it does not follow that other appropriations can not be made at other times and upon different petitions.

SAME.—*Appropriation.—Conditions of.*—Under said act of May 12th, 1869, a township may prescribe reasonable conditions. and make its appropriation payable thereon.

SAME.—*Statute.—Amendment.—Constitutional Law.*—An act, professing to amend a section of a statute which has already been superseded by amendment, is unconstitutional and void.

SAME.—Section 1 of the act of March 8th. 1879, Acts 1879, p. 46, is constitutional.

SAME.—*Tax Collected.—Where Expended.*—When aid is given by a township for the construction of a railroad through the same, the money need not necessarily be expended on that part of the road within the limits of the township, but it may be expended on the road outside its limits.

SAME.—*Roads Already Constructed.*—Townships have no right to vote aid to railroads already constructed.

SAME.—*Constitutional Law.*—The laws providing for appropriations by taxation, for the construction of railroads, are constitutional.

SAME.—*Pleading.—Answer.*—An answer is not bad because it fails to an-

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swer an assumption expressed in a conclusion of law stated by the pleader, and which is altogether unsupported by the specific facts affirmatively alleged in the complaint.

SAME.—*Appropriation to.*—*Payment to Company.*—To entitle a railroad company to receive the money appropriated, the road need not be perfect in every respect, but it must be so far completed that it may be properly and regularly used for the purpose of transporting freight and passengers.

From the Gibson Circuit Court.

J. E. McCullough and *L. C. Embree*, for appellants.

T. R. Paxton, *B. H. Young* and *L. C. Walker*, for appellees.

ELLIOTT, J.—This was a complaint by the appellants, who were citizens and taxpayers of Patoka township, Gibson county, to enjoin the collection of a tax which had been levied for the benefit of the Louisville, New Albany and St. Louis Railroad Company. A demurrer was sustained to the first paragraph of the complaint. The demurrers of the appellees, the board of commissioners, and of Montgomery, the auditor, were sustained to the second paragraph. The demurrers of the other appellees were overruled. Answer was filed by the appellees whose demurrers were overruled, and to it the demurrer of appellants was overruled.

The important and controlling questions are those presented by the assignment of error based on the ruling sustaining the demurrer to the first paragraph of the complaint, and those questions will first receive consideration.

The complaint is very lengthy, and it would greatly prolong this opinion to give even an outline of its allegations. No questions of pleading are involved; the case turns upon the correctness of general principles which controlled and led to the opinion of the court below, and these questions can be more fully presented, and be better understood, by referring to the facts out of which the questions spring as each question is discussed, than by giving an introductory summary of the matters pleaded.

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Four general propositions are stated and discussed by the appellants. The first is substantially as follows: The act under which the Louisville, New Albany and St. Louis Railroad Company was organized, that of March 3d, 1865, did not authorize it to construct a railway east of Princeton, and hence the corporation had no authority to receive a donation for the purpose of constructing a road east of that town.

It is argued at much length that there could be no valid tax assessed for the purpose of aiding the railroad company to construct a road east of Princeton, for the reason that the organization of the corporation was such that its authority to build a road did not extend beyond the said town. The whole argument is based upon the proposition that the organization of the corporation was such as restricted the line of its route to the point named. The question of the organization of the corporation and all matters incidentally connected with it were necessarily determined by the commissioners as jurisdictional matters when they pronounced judgment upon the petition for the assessment of the tax, and can not now be collaterally inquired into. The case of *The Board, etc., v. Hall*, 70 Ind. 469, furnishes a conclusive answer to the argument of the appellants. The doctrine which applies to the point under immediate mention is there clearly and forcibly expressed. In addition to the authorities there collected may be added *Ryan v. Varga*, 37 Iowa, 78; *The Louisville, etc., R. R. Co. v. The State*, 19 Am. R. Cas. 107; *Porter v. Stout*, ante, p. 3; *Miller v. Porter*, 71 Ind. 521; *Faris v. Reynolds*, 70 Ind. 359.

The second proposition is thus stated: "There having been collected, by taxation, from the taxpayers of said township, the sum of seventy-five thousand dollars, and appropriated to aid in the construction of said railroad through Patoka township, and that sum being equal to two per centum upon the amount of the taxable property of said

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township, on the tax duplicate of the preceding year, there can not now be legally collected an additional tax for the purpose of aiding in the construction of the same road through said township.”

In order to clearly apprehend the force and bearing of this proposition, it is necessary to briefly state the substance of the allegations of the complaint upon this point: Prior to June, 1869, a corporation, known as the Louisville, New Albany and St. Louis Air Line Railroad Company, had been organized. At the June session of the Board of Commissioners of Gibson county, an order was made, upon the proper petition, for an election, to determine whether a donation of \$50,000 should be made to said corporation, and a tax levied for that purpose; the tax was voted, levied and collected. Afterward an additional donation of \$25,000 was voted, tax levied and collected. The aggregate of \$75,000 was equal to two *per centum* of value of taxable property of the said township. After this had been done, and after the corporation had constructed part of its road, a decree of foreclosure was entered upon a mortgage which said corporation had executed, sale made thereon, and conveyance executed. The purchasers at such sale filed articles of association, under the act of March 3d, 1865, 1 R. S. 1876, p. 728, and organized as a corporation, under the name of The Louisville, New Albany and St. Louis Railway Company. In August, 1878, this corporation consolidated with the St. Louis and Mt. Carmel Railroad Company, a corporation organized under the laws of Illinois. The consolidated corporation retained the name of that organized under our statute. In April of the following year, a petition was presented to the commissioners, asking that a donation of \$60,000 be made to said railway company, and such proceedings were had as resulted in an election, a majority vote in favor of such donation, and the levy of a tax of one *per centum*. Collection of this tax is here resisted, as the proposition in-

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dicates, upon the ground that the prior levy of two *per centum* exhausted the power of the commissioners.

It is necessary that the statute controlling this matter should be set out, for it is very difficult to obtain a clear apprehension of the question without a full examination of its provisions. The act governing the case is that of May 12th, 1869, and the sections of the act which control the point under immediate discussion are sections 1 and 13, which are as follows :

“Section 1. That whenever a petition shall be presented to the board of commissioners of any county in this State, at any regular or special session thereof, signed by twenty-five freeholders of any township of such county, asking such township to make an appropriation of money to aid a railroad company, named in such petition, and then duly organized under the laws of this State, in constructing a railroad in or through such township, by taking stock in or donating money to such company to an amount specified in such petition, not exceeding, however, two per centum upon the amount of the taxable property of such township on the tax duplicate of the county delivered to the treasurer of the county for the preceding year, it shall be the duty of such board of commissioners, after being satisfied that such petition has been properly signed by the requisite number of freeholders of such township as aforesaid, to cause the same to be entered at full length upon their records.

“Section 13. No township shall be authorized by the provisions of this act to appropriate to railroad purposes, or to raise by taxation for such purpose, to exceed two per centum upon the taxables of such township, as said taxables shall appear upon the tax duplicate of the county, in any one period of two years.”

We agree with counsel for appellants, that the right to make appropriations is limited as to the amount which may be assessed at one time or upon one petition. We regard this doctrine as settled, and rightly settled, by the case of

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The Columbus, etc., R. W. Co. v. The Board, etc., 65 Ind. 427. But settling the question as to the amount which may be levied upon one petition does not dispose of the case. It by no means follows that, because the amount of any one appropriation is limited to two *per centum*, other appropriations may not be made at other times and upon different petitions. Sections 1 and 13 must be construed together, and, when thus taken, we find in one the limit as to the amount, namely two *per centum*, in the other the limit as to the time within which such amount may be levied, namely, "within any one period of two years." We must give the statute this construction, or we must hold that the last clause of section 13 is utterly meaningless. This we can not do, without violating the familiar rule that every "sentence, clause and word of a statute shall be given effect, and be deemed to have some meaning."

There is nothing in the act indicating that the power to make an appropriation is exhausted when once exercised. Section 1 of the act fixes, as we have seen, the amount which shall be assessed upon one petition, and section 13 provides that such assessments shall not be made oftener than once in two years, but there is nothing restricting the exercise except as to the amount named and to the period limited. In *Empire v. Darlington*, 101 U. S. 87, it was insisted that, where such a power as that exercised by the commissioners in this case was once exercised, it was exhausted, but the court declared this doctrine "to be clearly untenable," and held that there might be continued exercises of the power, provided the limit expressly designated by the statute was not transcended.

It is argued, with much plausibility, by the appellees, that the corporation to which the last appropriation was voted is not the same as that to which the first appropriation was made. There are cases which go very far toward supporting the appellees. In ordinary cases there can be little ques-

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tion as to the correctness of the proposition, but, under the peculiar provisions of the act of 1865, and under the facts of this case, there is some room for debate. It is not, however, necessary for us to decide that question, and we give no opinion upon it.

The third proposition stated by the appellants is: "The condition contained in the petition, upon which the tax in question was voted, renders the petition and all proceedings thereon void." One branch of the argument of appellants is, that the condition expressed is unwarranted by any statute of the State. The condition is thus stated in the petition: "If said company shall fully construct so much of their said railroad as lies between the town of Princeton, in said Patoka township, and the eastern boundary line of said Gibson county, and a train of cars shall have passed over the same, on or before the 1st day of January, 1883, then one-half of said appropriation, being thirty thousand dollars, shall be paid to said company as soon as the same is collected, and afterward, when said company shall fully construct their said railroad to the town of Huntingburg, in Dubois county, in the State of Indiana, and a train of cars shall have passed over the line of said railroad from the town of Princeton, in said Patoka township, to said town of Huntingburg, then, and not otherwise, the residue of said sum, being \$30,000, shall, when collected according to law, be paid to said company."

The case of *Bittinger v. Bell*, 65 Ind. 445, holds that the township may prescribe reasonable conditions, and make their subscriptions payable thereon. It was there said: "It seems to us that it may well be held, as we now hold, that the township may, in making its subscription and in the preliminary proceedings which enabled it to make the subscription, prescribe such reasonable conditions as are not in conflict with either the letter or the spirit of the law." This doctrine is well sustained by authority. *The People v. Dutcher*,

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56 Ill. 144 ; *The People v. County of Tazewell*, 22 Ill. 147 ; *Port Clinton R. R. Co. v. Cleveland, etc., R. R. Co.*, 13 Ohio St. 544, 559 ; *The State, ex rel., v. The County Court, etc.*, 51 Mo. 522 ; *Faris v. Reynolds*, 70 Ind. 359. The right to prescribe conditions being held to exist, the question remaining for investigation is whether the conditions prescribed in the petition in the present case were opposed to any law. If we are to regard the act of 1879 as in force, then the question as to the right to impose conditions is entirely free from difficulty, for that act broadly provides that the donation or appropriation may be made upon such terms and conditions as may be specified in the petition. Acts 1879, p. 46. It is, however, very earnestly insisted that section 1 of the act of 1879 is invalid. The argument upon this point is that "the section is void for the reason that it purports to amend section 1 of the act of May 12th, 1869, when that section had been already amended by the act of March 17th, 1875." It is settled that a section of a statute which has been once amended can not be again amended. *Blakemore v. Dolan*, 50 Ind. 194. An act professing to amend a section of a statute which has already been superseded by amendment is, as declared in the case cited, "unconstitutional and void." The act of 1879 does, by its title, profess to amend sections 1, 2, 3, 4, 8, 13 and 17 of the act of 1875, and does amend them by substituting amended sections for the original ones. The contention of appellees is not that the act of 1875 does not amend section 1 of the act of 1869, but that the act of 1879 amends the amendatory act of 1875, and does not profess to amend that of 1869. The title of the act of 1879 is as follows: "An act to amend the 1st and 14th sections of an act entitled 'An act to authorize aid to the construction of railroads by counties and townships taking stock in and making donations to railroad companies,' approved May 12th, 1869, and amended by an act entitled 'An act to amend the 1st, 2nd, 3rd, 4th, 8th, 13th and 17th sections of an act entitled 'An act to au-

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thorize aid to the construction of railroads by counties and townships taking stock in and making donations to railroad companies,''' approved March 17th, 1875, and declaring an emergency.'' Section 14 of the act of 1869 had never been amended, and this is probably why the title of the act of 1879 makes reference to that act, for it was certainly necessary to refer to that act in the title of the amending act, and we do not think any one could have been misled by the title of the latter act. Although the title of the act last mentioned is somewhat confused, yet we think it fairly indicates the particular acts and sections intended to be amended. Even if the matter were in doubt, it would be our duty to uphold the law, and declare that the Legislature had not violated the provisions of the constitution. We decide, therefore, that section 1 of the act of 1879 is constitutional and valid.

Another branch of appellants' argument is that neither the petitioners nor the commissioners had any authority to prescribe terms or conditions in violation of the statute. To this general proposition we unhesitatingly yield assent. While conditions may be imposed, they must be such as the statute does not forbid either by express words or necessary implication. The general grant of power contained in section 1 can not be construed to confer authority to make terms or conditions which the statute does not authorize. It is contended that the petition and order violated the provisions of the statute, because they allow money to be used in constructing a part of the railroad lying outside of the limits of the township. To state the point in other words, the position of counsel is, that townships have no right to appropriate money to be used in building a road beyond the township limits, but that all such money must be used in the construction of that part of the road situate within the limits of the township. This position is not tenable. It is true that the road to which the appropriation is made must touch some part of the township (*Alvis v. Whitney*, 43 Ind.

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83), but we do not think that all the money must be expended in the township making the appropriation. In *Petty v. Myers*, 49 Ind. 1, it was said: "As at present advised, we are not inclined to the opinion that when aid is given by a county or township for the construction of a railroad running through the same, the money must necessarily be expended upon that part of the road lying in the county or township." It is true that in the case cited there was no decision upon this point, and that case is not to be regarded as doing more than indicating the views of the court. We think the intimation of that case a correct expression of the law. There is nothing in the letter of the statute requiring the money to be expended within the township, and nothing in the spirit of the law evincing such a requirement. The object of the statute was to secure to the citizens of counties and townships the advantages of railways, not to secure the distribution of money within county or township limits. The intention of the Legislature was to enable the citizens of townships to aid in the building of lines of railways which would afford them means of transportation not simply within the township limits, but beyond to the market places and cities of the country. But we need not elaborate this point, for there is nothing in the statute requiring that the money appropriated shall be expended within the limits of the township, and we have no right to interpolate such a provision even if we had the inclination.

Townships have no right to vote aid to railways already constructed. The statute certainly confers no such authority, and none exists independently of the statute. While this is true, we think it furnishes the appellants no assistance, for we do not understand that any appropriation was made to a company which had completed its road. On the contrary, we think it affirmatively appears that the road of the company, to which Patoka township voted aid, was not completed, but was in progress of construction.

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The fourth proposition of appellants is, "that the statutes providing for these appropriations by taxation are unconstitutional." The question as to the constitutionality of these statutes is not an open one; it has been settled against appellants by repeated decisions of this court. If there were no other reasons requiring us to uphold these statutes, we should feel compelled to sustain them upon the principle of *stare decisis*.

We come now to the questions arising upon the answer. The single objection urged against the answer is that it does not show that the railroad company had fully performed the conditions imposed by the petition and order. Upon this point the complaint was as follows:

"And plaintiffs further charge that said railway company did not, on or before the 1st day of January, 1880, fully construct so much of its said railway as lies between the town of Princeton, in said Patoka township, and said eastern boundary line of said county, but, on the contrary, said railroad on said day, and for a long time thereafter, was and remained wholly unfinished and incomplete in many particulars, among which the following: The cross-ties upon said road were too few in number and placed thereon too wide apart, and only so placed as to support the iron of said road temporarily. The iron rails upon said road had never been fully spiked to the cross-ties, but only one half of the necessary spikes for the full construction of said road were used thereon, on or prior to the said 1st day of January, 1880; that no part of said railroad, on the close of said day, had ever been ballasted; that the grades and cuts and embankments of said road had never been completed; that the embankments and excavations were so incomplete, that it left many and unnecessarily heavy grades upon said road; that the bridges and culverts and trestle works upon said road remained unlevel, the same having never been levelled."

The answer of the appellees to the allegations contained

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in the above extract from the complaint was as follows: "Said railroad company, relying upon said proceedings and desiring to comply with the terms of said petition and to become entitled to said aid, entered upon the construction of its railroad in and through said county, and so fully constructed its said railroad in said county, that, on the 1st day of December, 1879, the same was ready for running locomotives and trains of cars thereon; * * * that from said 1st day of December, 1879, continuously to the present time, the entire line of the railroad of said company lying within said county of Gibson, from the western to the eastern boundary thereof, has been so fully constructed that trains of cars have daily (Sundays excepted) run over the same; and said railway company has, during said time, in *good faith*, operated the same as a railroad, and held itself out to the public as a common carrier, and has carried the United States mails, and transacted the freight and passenger business of the county along the line of said railroad through said Gibson county to and from said town of Princeton." It may be that this is not a full answer to the part of the complaint quoted, but it does, nevertheless, show a full performance of the conditions prescribed by the petition. In the part of the complaint quoted, the pleader charges the corporation with not having done what it was not bound to do, and of course the answer was not required to meet such a charge. The answer avers that the railway corporation did do all that the petition and order required it to do. The fault is not in the answer, but in the complaint, for the latter assumes that the railway company was bound to do more than the petition or order required, and upon this erroneous assumption makes the charge which it is said the answer does not deny or avoid. The answer does show full performance of all that the railway company was bound to do, and is not bad merely because it fails to answer an assumption expressed in a con-

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clusion of law stated by the pleader, and which is altogether unsupported by the specific facts affirmatively pleaded in the complaint.

The meaning of the petition upon which the appropriation was based is, that the road shall be completed as therein prescribed prior to receiving the money appropriated. It is not meant that the road shall be perfect in every respect, but that it shall be so far completed as that it may be properly and regularly used for the purpose of transporting freight and passengers. The language of the court in *Freeman v. Matlock*, 67 Ind. 99, is so strongly applicable here that we adopt it, substantially: It was not necessary that the road should be perfect and finished in every particular, and its track well ballasted. But it seems to us that the road should have been so far completed on its located and established line, that the cars might have been and were run over it with reasonable regularity.

Judgment affirmed.

No. 7852.

THE WAYNE AGRICULTURAL CO. v. CARDWELL ET AL.

PROMISSORY NOTE.—Forgery.—Principal and Surety.—When the name of one of two or more obligors in a bond, note or other writing obligatory, has been forged, the other co-obligor, though a surety only, and though he signed in the belief that the forged name was genuine, is nevertheless bound, if the payee or obligee accepted the instrument without notice of the forgery.

From the Madison Circuit Court.

W. Garver and *R. R. Stephenson*, for appellant.

FRANKLIN, C.—Appellant commenced a suit in the Hamil-

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ton Circuit Court, against Isaac S. Poe, Silas Helms and Peter Cardwell, on a note for \$500.

There was a judgment by default against Poe and Cardwell. Helms answered by denying under oath the execution of the note. A trial was had on this issue, and a finding and judgment thereon was entered for the defendant.

After this, according to the record, Cardwell instituted some kind of a suit against Poe *et al.*, and a demurrer was filed to the complaint. From a minute made by the clerk in the record, it appeared that the complaint and demurrer were not on file, and they are not copied in the record. As to what became of that suit the record gives no further information.

The parties appeared again in court, and Cardwell filed an answer to the complaint in the original cause, to which appellant filed a demurrer. Demurrer overruled and exception; reply filed to answer; demurrer to reply overruled and exception.

The venue in the cause was then changed from the Hamilton to the Madison Circuit Court. Trial there by jury; verdict and judgment for the appellee Cardwell.

In this court appellant complains of the following errors of the court below, to wit:

1. The court erred in overruling the demurrer to the answer of the defendant Peter Cardwell;

2. The court erred in overruling the motion for a new trial, as made and filed by the plaintiff.

We presume that, in relation to the judgment by default against Cardwell, there is some mistake in the record, or the court would have had no subsequent proceedings in relation to the cause.

The first error complained of is the overruling of the demurrer to the defendants' answer. The substance of this answer is about as follows, to wit: That Poe had repeatedly requested the defendant Cardwell to sign for him three prom-

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issory notes for \$500 each, payable to appellant ; that he declined so to do unless Poe would procure the signature of one Helms also to the notes. Afterward, said Poe presented the notes, with the name of said Helms attached thereto, and falsely represented said signature of Helms to be genuine ; that Cardwell was unacquainted with the signature of said Helms, believed said representation of Poe to be true, was thereby induced to and did sign said notes ; that the signature of said Helms was not genuine, but a forgery, and that said Helms had been released from all liability on account thereof ; and that, by reason thereof, he should be also released.

The question arising upon the demurrer to this answer has been fully decided by this court, at the present term thereof ; as the case was from the same county, and between the same parties, we presume it was based upon one of the same notes mentioned in this answer. The case we refer to is *Helms v. The Wayne Agricultural Co.*, ante, p. 325. In that case this court has decided that, where the name of one of two or more obligors on a bond, note or other writing obligatory has been forged, the supposed co-obligor, though a surety only, and though he signed in the belief that the forged name was genuine, is nevertheless bound, if the payee or obligee accepted the instrument without notice of the forgery.

According to that decision, and the authorities therein cited, the court below erred in overruling the demurrer to the answer. This renders it unnecessary that we should decide upon the error assigned in overruling the motion for a new trial.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and is hereby, in all things reversed back to the filing of the answer in said cause, with costs, and that it be remanded, with instructions to the court below to sustain the demurrer to the answer, and for further proceedings.

Parsley v. Eskew.

No. 7808.

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73	558
126	568
73	558
168	299

APPEAL.—*Dismissal.*—*Amount in Controversy.*—*Supreme Court.*—*Justice of the Peace.*—Where, in an action originating before a justice of the peace, no counter-claim or set-off is pleaded, and the plaintiff is content with the amount of his recovery, that amount must be deemed to be the amount in controversy, and where such amount is less than fifty dollars, an appeal from the judgment rendered therefor, to the Supreme Court, will be dismissed.

From the Hamilton Circuit Court.

T. J. Kane and *T. P. Davis*, for appellant.

D. Moss and *R. R. Stephenson*, for appellee.

ELLIOTT, J.—This action originated before a justice of the peace. In the justice's court, the appellee, who was the plaintiff, recovered judgment for thirty-nine dollars, and from this judgment the appellant appealed to the circuit court, where the case was again tried, and a judgment rendered against appellant for thirty-one dollars.

There was no counter-claim or set-off pleaded by the appellant, and the appellee was content with the amount for which he recovered judgment, and that must, therefore, be deemed to be the amount in controversy. Had the appellant been demanding a recovery of any sum from the appellee, then it might be said, that, as to him, there was a controversy about a greater sum than that named in the judgment; but there was no such claim. The amount in controversy is the sum for which judgment was rendered, for the only controversy is, whether the appellee shall have that sum or not. That sum is all that appellee seeks to recover, and appellant's contention is confined to a resistance of payment of that sum, and that only. There is nothing else in controversy. As the action originated before a justice of the peace, and as the amount in controversy is less than fifty dollars, the appeal must be dismissed. *Sprinkle v. Toney*, *post*, p. 592.

Appeal dismissed, at costs of appellant.

 McCallister v. Mount.

No. 7605.

McCALLISTER v. MOUNT.

73	559
133	539
73	559
148	186
73	559
158	663
73	559
161	382

PRACTICE.—Complaint.—Supreme Court.—An assignment of error in the Supreme Court for insufficiency of facts, which questions less than the entire complaint, is insufficient.

SAME.—Assignment of Error Must be Specific.—An assignment questioning the entire complaint should contain at least one of the objections for which alone error can be assigned in the Supreme Court.

SAME.—Special Findings.—General Verdict.—The court will not presume anything in aid of the special findings, but will indulge every reasonable presumption in favor of the general verdict.

SLANDER.—Publication.—Exhibiting a libellous letter and proclaiming its contents, or giving it to others to read, constitute a publication.

SAME.—Proof of Set of Words.—Identity of Person Slandered.—Variance.—Only the identical words charged as slanderous need be proved, a variance in name being immaterial.

SAME.—New Trial.—Proof of Publication.—That the libel was read in evidence without proof of its publication, is not ground for a new trial.

PRACTICE.—Directions to Jury.—Oral Instructions.—Oral directions to a jury to sign their general verdict, or to answer interrogatories, are not instructions within the meaning of the law.

From the Montgomery Circuit Court.

J. Wright, J. M. Seller, W. H. Thompson and J. M. Thompson, for appellant.

P. S. Kennedy and W. T. Brush, for appellee.

BEST, C.—The appellee commenced this suit against the appellant on the 25th day of February, A. D. 1878. His complaint consisted of two paragraphs. The first averred, in substance, that the defendant had, by reading to divers persons, maliciously published, of and concerning the plaintiff, a certain letter, in which it was falsely charged that the plaintiff, while in the army had committed the crime against nature, with a mule. The second contained several sets of words, alleged to have been falsely and maliciously spoken by the defendant, of and concerning the plaintiff, the substance of each of which was, that the plaintiff had had sexual intercourse with a mule, while in the army.

Answers in denial, and in justification, were filed; also a

McCallister v. Mount.

reply. The cause was submitted to a jury, and a general verdict returned for the plaintiff for \$800, with answers to interrogatories submitted to them, at the instance of the defendant. A motion was made by the defendant, for a judgment in his favor on the special findings of fact, notwithstanding the general verdict, which motion was overruled, and the defendant excepted. The defendant then made a like motion for a judgment upon the first paragraph of the complaint, which was overruled, and he excepted. Thereupon he moved the court for a new trial, which was overruled, and to which ruling he also excepted. Final judgment was rendered upon the verdict, from which the appellant appeals to this court, and assigns as error here the following:

1st. For insufficiency of the averments of the first paragraph of the complaint.

2d. For insufficiency of the averments of the second paragraph of the complaint.

3d. For insufficiency of the complaint.

4th. The court erred in overruling appellant's motion for judgment, in his favor, upon the special finding of the jury, notwithstanding the general verdict.

5th. The court erred in overruling appellant's motion for judgment, in his favor, on the first paragraph of the complaint, notwithstanding the general verdict.

6th. The court erred in overruling the motion for a new trial.

7th. The court erred in giving the jury oral instructions, after they had returned a general verdict, and answering the first interrogatory.

8th. The court erred in returning the verdict to the jury after it had been read by the court and published, and then ordering the jury back to the jury room, and instructing them to answer the second interrogatory.

These assignments will be considered in the order of their

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statement. The first does not call in question the sufficiency of the complaint as an entirety, but only the sufficiency of the first paragraph thereof. This can not be done by an assignment of error. Section 55 of the code authorized the appellant to "demur to one or more of the several causes of action alleged in the complaint," and thus to present the question sought to be raised by this assignment. It does not, however, authorize the same thing to be done by an assignment of error. The only right to question the sufficiency of the complaint, by an assignment of error, at all, is found in section 54 of the code, which provides that, "If no objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court over the subject of the action, and except the objection that the complaint does not state facts sufficient to constitute a cause of action." All objections to a complaint, whether it consists of one or of many paragraphs, are waived, except the objections that the court had no jurisdiction, and that the complaint does not state facts sufficient to constitute a cause of action. Either or both of these may be assigned as error in any way that calls in question the entire complaint. If the assignment alleges that the complaint does not state, or that all the paragraphs of the complaint do not state, or that neither paragraph of the complaint states, facts sufficient to constitute a cause of action, either will be a sufficient assignment; but any assignment which questions less than the entire complaint will be insufficient. Upon such an assignment, the remaining paragraphs of the complaint will be regarded as good, and it is well settled that, upon a proper assignment, if there is one good paragraph, the alleged error will be unavailing. *Miller v. Billingsly*, 41 Ind. 489; *Kelsey v. Henry*, 48 Ind. 37; *Caress v. Foster*, 62 Ind. 145.

For these reasons, the first and second assignments present no question. Neither does the third. There may be

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many valid objections to a complaint aside from the objections that are not waived by a failure to raise them, either by demurrer or answer. The court may not have jurisdiction of the person of the defendant; the plaintiff may not have legal capacity to sue; there may be another action pending between the same parties for the same cause; there may be a defect of parties, plaintiff or defendant; several causes of action may have been improperly united, and, if either of these objections exist, the complaint is insufficient. All of them, however, are waived by failing to raise them, either by demurrer or answer, and, unless thus raised, none of them can be considered on an appeal to this court. *McGoldrick v. Slevin*, 43 Ind. 522; Buskirk's Practice, 171, and authorities cited.

This assignment is too general. It is impossible to determine from it whether the complaint is insufficient because of the objections waived by a failure to raise them by demurrer or answer, or whether it is insufficient because of those objections, which may be assigned in this court. Sec. 568 of the code requires no pleadings in this court but a *specific* assignment of errors; and unless the assignment is *specific*, it presents no question for decision. An assignment is not specific, when the language employed applies as well to an objection which has been waived as to one that has not been waived. This assignment is not only general, but it is uncertain, indefinite and equivocal. It does not comply with the letter of the statute, nor do we think that it can be deemed sufficient by any construction, however liberal. When a party in the lower court fails to question the sufficiency of the complaint, either by demurrer or by motion in arrest of judgment, he should, when he attempts to do so here, be required not only to make his objections specific, but he should specify at least one of the objections for which alone error can be assigned on a complaint in this court.

By the fourth assignment, the appellant insists that the

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court erred in refusing to render judgment for him upon the special findings of fact. The interrogatories and answers thereto are as follows :

“1st. If you find for the plaintiff upon one paragraph of complaint only, state which one it is. Ans. We find on first paragraph.

“2d. If you find for plaintiff on both paragraphs of the complaint, so state. Ans. We find on second paragraph.

“3d. Was it proven that defendant, or any other person, read the letter mentioned in plaintiff's complaint, at Shannondale, February 24th, 1878? Ans. No.

“4th. If you answer yes to interrogatory three, state who read it. Ans. No one.”

Assuming, without deciding, that the first and second interrogatories propound proper questions of fact to the jury, the answers establish such fact as would otherwise have been presumed, viz., that the verdict was upon both paragraphs of the complaint. The only other fact specially found is that the appellant did not, nor did any other person, read the letter mentioned in the complaint, at Shannondale, on February 24th, 1878. This is not at all inconsistent with the general verdict. If the appellant read it to any other person as charged, at any other place, on said day, or did the same thing at said place on any other day after said letter was written, and before the commencement of the suit, the appellee was entitled to recover. To have rendered this fact inconsistent with the general verdict, it was necessary that it should have also appeared that the general verdict was based alone upon the first paragraph of the complaint, and that the appellant did not read said letter to any person at any other time or place. The court will not presume anything in aid of the special findings of fact, but, on the contrary, will indulge every reasonable presumption in favor of the general verdict. *Ridgeway v. Dearing*, 42 Ind. 157. There was no error in this ruling.

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It is also insisted that the court erred in overruling a similar motion for a judgment upon the first paragraph of the complaint, for the reason that the answer to the third interrogatory shows there was no evidence to support it. This fact can not be shown in this way ; nor does it, if true, furnish any ground for the motion. This motion, like the other, is based upon the assumption that the special findings of fact are inconsistent with the general verdict, and what was said in considering the other applies to and is decisive of this one. *Frazer v. Boss*, 66 Ind. 1.

This brings us to the alleged error, in overruling the motion for a new trial. The reasons filed therefor were :

- 1st. The verdict was contrary to law ;
- 2d. It was not sustained by sufficient evidence ;
- 3d. The damages assessed were excessive ;
- 4th. The court erred in admitting, in evidence the letter mentioned in the first paragraph of the complaint ; and,
- 5th. The court erred in charging the jury orally, after having been requested to do so in writing.

In support of the first and second causes, which will be considered together, the appellant insists that the evidence does not tend to show that the letter mentioned in the first paragraph of the complaint had been published ; nor that any set of words embraced in the second paragraph were proved as laid, or, if proved, were shown to have been spoken of the appellee. We have examined the evidence carefully, and think that it fully establishes each of these propositions. It clearly shows that, sometime before the letter in question was written, a dispute had arisen between the appellee and the appellant about the alleged forgery of the appellee's father's name to a certain petition ; that appellant felt hurt at some imputations he understood the appellee had made against him in relation thereto ; that he then wrote to one McCallister for information in relation to the charge of which the appellee complains, and received in answer thereto the

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letter in question ; that the appellee was present, and was the superintendent of a Sabbath school that met at Shannondale, on the 24th day of February, 1878 ; that after it was dismissed, but before the persons attending it had dispersed, the appellant came to said school, quarrelled with appellee, and after he, appellee, had gone away, exhibited said letter, offered to let any person present read it, proclaimed its contents, and handed it to one Samuel Knox, who, as the appellant himself testified, read a part of it.

If he read the libellous part the publication was complete. We can not say that he did not, and, therefore, can not disturb the judgment on this ground.

Did the testimony prove any set of words? The first set was that "Jim Mount was caught," etc., committing the offence charged.

Thomas Nicely testified that the appellant, in the conversation at Shannondale, on February 24th, 1878, said "Jim was caught," etc., and that he spoke the identical language contained in the first set of words, except the surname of the appellee. This variance was immaterial. It is only necessary to prove so many of the identical words charged as constitute the slanderous accusation. *Iseley v. Lovejoy*, 8 Blackf. 462 ; *Tucker v. Call*, 45 Ind. 31. Were these words spoken of the appellee? They were spoken immediately after the appellee and appellant ceased disputing at Shannondale, on February 24th, 1878, about the appellee's charge that his father's name had been forged to a petition. The appellant testified as follows : "James A. Mount is my brother-in-law ; a few days before I met Mount at Shannondale, on February 24th, 1878, I received information that Mount said his father's name had been forged to a petition, and that my father had forged it. I went to ask Mount about the charge of forgery. He said there had been forgery committed. After that we had a good many words in relation to this forgery."

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The words testified to by Nicely were spoken in the same conversation referred to by the appellant, and Nicely says that the appellant, after he had spoken the words, "Jim was caught," etc., added, "and it was the common talk of the company, and that was the character of the man who was accusing his father of forgery."

This charge was spoken of the person who was accusing the appellant's father of forgery, and that person, according to appellant's own testimony, was James A. Mount. The very language of appellant, accompanying the slanderous charge, unmistakably points to the appellee as the person who was designated by the name "Jim," and was as satisfactory, we think, as though the name James A. Mount had been used.

The third cause for a new trial is not insisted upon by the appellant in his argument, and therefore will not be further noticed.

By the fourth cause he insists that the publication of the letter was not proved, and for that reason the court erred in admitting it in evidence. In support of this position, a part of section 278 of Townshend on Slander and Libel is cited; but it is said in the same section that, if the libel is read in evidence, without proof of its publication, this is "not a ground for a new trial."

The court had been, at the proper time, requested to instruct the jury in writing, and the fifth cause for a new trial calls in question the action of the court, in saying to the jury, after they had returned into court with their verdict, "The jury have not answered the second interrogatory, and I therefore cause the verdict and interrogatories to be returned to you, and you can return to your jury room and answer the second interrogatory, and return the verdict and interrogatories together, in case you now find a general verdict?"

It is well settled that it is error to instruct the jury orally, after a request has been made, at the proper time, to instruct

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in writing. *Gray v. Stivers*, 38 Ind. 197 ; *Hardin v. Helton*, 50 Ind. 319.

If this statement is an instruction, it was error to give it. Is it an instruction? It is said in Bouvier's Law Dictionary, under the word "charge," that an instruction is "The exposition by the court to the jury of those principles of the law which the latter are bound to apply in order to render such a verdict as will, in the state of facts proved at the trial to exist, establish the rights of the parties to the suit." Again: "The essential idea of a charge is that it is authoritative as an exposition of the law, which the jury are bound by their oath and by moral obligations to obey."

In Hilliard on New Trials, 2d ed., at page 255, it is said: "And any decision or declaration by the court, upon the law of the case, made in the progress of the cause, and by which the jury are influenced and the counsel controlled, is considered within the scope and meaning of the term 'instructions.' "

In *Hasbrouck v. The City of Milwaukee*, 21 Wis. 219, it is said that any remarks made orally by the presiding judge, are no part of the charge, unless bearing upon questions of law or fact involved in the issue.

This court in the case of *Lawler v. McPheeters*, *post*, p. 277, decided at the present term, said: "Instructions proper are directions in reference to the law of the case." So it is held in *Stanley v. Sutherland*, 54 Ind. 339.

In the light of these authorities, the above statement was not an instruction. It was not a statement bearing upon any question of law or fact involved in the issues, but was a mere direction to find a verdict before they returned it. A direction to retire with their bailiff; to separate for their meals; to seal up their verdict; to abstain from talking among themselves or with others; to sign their general verdict or to answer interrogatories, are not instructions within the meaning of the law, and therefore there was no error in directing the jury orally to answer the second interrogatory.

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The eighth assignment presents no question. The cause alleged should have been urged as a reason for a new trial. It was not, and, if it had been, there was no error in it. *The Columbus, etc., R. R. Co. v. Powell*, 40 Ind. 37.

We find no error in this record, and think the judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and is hereby, in all things affirmed, at the costs of the appellant.

No. 7788.

FARMAN *v.* LAUMAN ET AL.

HUSBAND AND WIFE.—*Injury to Wife.*—*Witness.*—*Damages.*—Under section 1 of the act of March 11th, 1867, 2 R. S. 1876, p. 132, a wife is a competent witness in an action by her and husband to recover damages for a personal injury to herself.

PRACTICE.—*Evidence.*—*Objection.*—In such action, an objection, at the conclusion of the testimony of a witness, given in narrative form, that the “defendant excepts to all the evidence in reference to damages to clothing, medical attendance,” etc., is insufficient to reserve any question for the decision of the Supreme Court.

SAME.—*Exception to Exclusion of Evidence.*—In order to save an exception to the action of the court in excluding questions asked a witness, an offer should be made to prove the facts sought to be elicited.

SAME.—*Attorney.*—*Argument to Jury.*—*Change of Venue.*—The fact that the venue of a cause had been changed is not a proper subject to be mentioned or commented upon by counsel in the argument to the jury.

SAME.—*Objection.*—*Exception.*—*Supreme Court.*—An objection, not followed by an exception, is not available on appeal to the Supreme Court.

EXEMPLARY DAMAGES.—*Assault and Battery.*—*False Imprisonment.*—Exemplary damages can not be awarded where the act which constitutes the cause of action is punishable by a criminal prosecution, as for assault and battery, but such damages may be recovered in actions brought by persons injured by wrongful restraint or false imprisonment.

73	568
124	128
73	568
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73	568
134	844
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138	596
138	663
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154	578
73	568
159	299
73	568
170	216

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SAME.—Excessive Damages.—Verdict of Jury.—Courts should not interfere with the verdict of a jury on the ground of excessive damages, unless such damages are so great as to appear outrageous, or such as to induce the belief that the award was the result of passion or prejudice and not the conclusion of deliberate judgment.

From the Hendricks Circuit Court.

G. W. Galvin, S. A. Huff and F. J. Mattler, for appellant.

J. B. Black, for appellees.

ELLIOTT, J.—This was an action by husband and wife, Charles A. Lauman and Mary J. Lauman, to recover for personal injury to the latter, alleged to have been inflicted upon her by the appellant. The complaint is in three paragraphs :

The first charges an assault and battery.

The second and third charge false imprisonment.

A trial by jury resulted in a verdict and judgment against appellant for five hundred dollars. The assignment of errors is upon the motion denying appellant a new trial.

Mary J. Lauman was permitted to testify as a witness, and of this ruling appellant complains, but his complaint is groundless. The action was by the husband and wife, jointly, it is true ; the wife, however, was the possessor of the meritorious cause of action, and the recovery was sought for her benefit. It was not an action in which the husband sought damages for loss of services of the wife, but an action in which the wife demanded compensation for personal injury which she had suffered at the hands of the appellant. Under the statute in force when the action was tried (of course there could be no question under the present statute), Mary J. Lauman was a competent witness. *Bennifield v. Hypres*, 38 Ind. 498 ; *Garner v. Gordon*, 41 Ind. 92.

The witness Mary J. Lauman, in describing, in narrative form, the wrongful acts of the appellant, said something as to her clothing having been torn, as to what physicians had

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said to her, and as to how long she had suffered from the injury inflicted, and to what extent she was disabled. At the conclusion of the witness' narrative, the appellant stated an objection, as follows: "Defendant excepted to all the evidence in reference to damage to clothing, medical attendance, loss of services, and hired help." This objection was not sufficient to reserve any question, for no specific grounds in its support were stated; and it is well settled that a party objecting to evidence must state the grounds of his objection. The objection in this case is, aside from the fault named, insufficient, because it is entirely too general in respect to the evidence which the appellant sought to have excluded from the jury.

The court refused to permit the appellant's counsel to ask several questions of him while he was on the witness stand, and of this ruling counsel now earnestly complain. We think the objections were properly sustained, but this we need not decide because the question is not properly presented. The appellant did not make any offer of proof, but contented himself with asking the interrogatories. In order to have saved the question, he should have made offer to prove the facts of which he sought to elicit evidence by the interrogatories of his counsel.

In the course of the argument of one of appellees' counsel, an improper remark, in response, it may be observed, by the way, to one equally improper, made by appellant's counsel, was made to the jury, whereupon the appellant objected. The character of the objection and the ruling of the court are shown by the following extract, which we make from the record: "At the conclusion of which words, the defendant by his attorney objected to the said Hadley's proceeding on the subject of the change of venue, whereupon the court admonished said Hadley that it was improper to refer to the change of venue, or to comment upon the subject, and also admonished the jury that they should disregard the allusion

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to the change of venue, and that they should decide the case as if it had been originally brought in Hendricks county, whereupon no further allusion was made by said Hadley, or any one else, to the change of venue in said cause." The remark of appellee's counsel was unquestionably an improper one, for the jury had nothing at all to do with the questions growing out of the change of venue, and counsel did wrong in commenting upon, or, indeed, in mentioning that subject. The appellant, however, obtained the ruling he sought by his appeal to the court, and is not now in a condition to complain. The extract we have made from the record shows that the appellant "objected to the said Hadley's proceeding on the subject of the change of venue," and that this objection the court in effect sustained, for it not only checked counsel, but it also gave to the jury the proper admonition. Where a party is granted all his objection or application seeks, he can not have tenable grounds upon which to support an attack upon the ruling of the court on his application, or objection. But, aside from this consideration, the ruling can not be here regarded as erroneous, because the appellant failed to reserve an exception. An objection not followed by an exception is of no avail upon appeal. If the court had granted a new trial, then we could not have reversed, although there was neither objection made nor exception reserved, as in that case the ruling would uphold the decision of the court below, in whose favor all reasonable presumptions are to be indulged, whereas, in the present case, to adjudge a reversal would be to overthrow the decision of the trial court, and this we can not do in such a case as that before us, unless objection has been duly made and exception properly entered. *The St. Louis, etc., R. W. Co. v. Myrtle*, 51 Ind. 566; *Kinnaman v. Kinnaman*, 71 Ind. 417.

It is undoubtedly true, as appellant's counsel insist, that where an act, which constitutes the cause of action, is punishable by fine or imprisonment, in a criminal prosecution,

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punitive damages can not be awarded the party who seeks recovery upon such a right of action. This rule applies to the cause of action stated in the first paragraph of appellees' complaint, but does not apply to the cause of action stated in the second and third paragraphs. It is argued that the fourth instruction given by the court violates the rule stated, but in this counsel are in error. The instruction under mention confines the right to recover exemplary damages to a case made out under the second paragraph of the complaint. The jury were plainly informed that exemplary damages could be recovered only in the event that the case stated by the second paragraph was properly made out by the preponderance of the evidence. In the third instruction the rule by which damages should be measured, in case the verdict should be upon the paragraph charging an assault and battery, was clearly and correctly stated. The instructions, taken together, very fully and fairly stated the law to the jury, as well upon the subject of damages as upon the essential elements of the causes of action upon which the appellees placed their right of recovery. The unlawful and wrongful restraint of personal liberty is an actionable wrong. Exemplary damages are recoverable in actions brought by the persons injured by the tortious restraint or imprisonment.

We can not disturb the verdict upon the ground that the damages are excessive. If the jury believed, as they were fully warranted in doing, Mary Lauman's testimony, she was wrongfully and forcibly imprisoned by the appellant. It is true that the confinement was for a very brief period, but it is also true, if we accept her testimony as veracious, that it was for a criminal purpose, and was accompanied by circumstances of great wrong and indignity. If the woman's story was true, as we are bound to assume, five hundred dollars was not, by any means, an excessive verdict. A wrongful imprisonment, accompanied by acts tending to degrade and insult, in the vilest manner, the person injured,

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makes a case where smart money of no inconsiderable magnitude may be rightly awarded. In such cases as that in hand, courts will not interfere with the verdict of a jury, upon the ground of excessive damages, unless the damages awarded are so great as at first blush to appear outrageous, or are such as to induce the belief that the award was the result of passion or prejudice, and not the conclusion of deliberate judgment.

It having been shown to the court that the appellee Mary J. Lauman has died since the submission of this appeal, judgment of affirmance is entered as of the date of May 29th, 1879.

 No. 7538.

BRISCOE v. JOHNSON, EXECUTOR.

PLEADING.—Exhibits.—Where exhibits are of such a character as not to become a part of a pleading by being filed with it, a demurrer to the pleading raises no question upon them or their validity, and the sufficiency of such pleading must be determined by its averments.

LEGAL DISABILITY.—Presumption.—When disability is not alleged it will be presumed not to exist.

GUARDIAN AND WARD.—Final Settlement.—Limitation.—The same limitation applies to the time in which an action may be commenced to set aside the final settlement of a guardian, as to actions to set aside the final settlement of an executor or administrator.

SAME.—Former Adjudication.—So long as the final settlement of a guardian remains in force, it is an adjudication of the matters lawfully embraced within it.

From the Spencer Circuit Court.

C. L. Wedding, for appellant.

T. F. DeBruler, for appellee.

NIBLACK, J.—This was an action by Sarah A. Johnson, formerly Sarah A. Williams, and her husband, Elbert John-

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son, against William Briscoe, to set aside a final settlement made by the defendant as the late guardian of the said Sarah, and to recover a sum of money alleged to be due from him as such late guardian. The action was commenced on the 17th day of January, 1878, and the complaint as originally filed contained but one paragraph. The defendant answered in several paragraphs, but before the issues, which were tendered by his answer, were closed, the plaintiffs filed a second paragraph to their complaint, which seems to have been mutually accepted as a substitute for the original complaint, and to have constituted the complaint upon which all the subsequent proceedings were based. The defendant demurred to the second paragraph of the complaint, for want of sufficient facts, but his demurrer was overruled. Before the issues were fully formed upon this second paragraph of the complaint, the death of Sarah A. Johnson was suggested, and Elbert Johnson, as the executor of her will, was substituted as sole plaintiff in the action. The court to which the cause was submitted for trial found that there was due to the plaintiff, in his capacity as executor as above stated, the sum of two thousand one hundred and sixty-five dollars and forty cents, and rendered judgment accordingly against the defendant for that sum.

The second paragraph of the complaint averred that on the 19th day of August, 1858, the defendant was duly appointed and became guardian of the person and estate of the plaintiff Sarah, then Sarah A. Williams, and as such guardian came into the possession of her estate; that on the 10th day of May, 1869, the defendant reported to the court of common pleas of Spencer county, that the said Sarah had arrived at full age, and that he was indebted to her, as her said guardian, in the sum of \$3,132.17, with which sum he was then and there, as such guardian, charged by said court; that on the 13th day of May, 1870, the defendant filed with the clerk of the said court of common pleas

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of Spencer county a receipt, purporting to be executed by the said Sarah, for said sum of \$3,132.17, and procured said court to enter an order discharging him from all further duties as such guardian; that the receipt so purporting to be executed by the said Sarah, and so filed by the defendant, was forged, false and fraudulent, and that the order discharging him from further duties as such guardian was thereby fraudulently procured to be entered by said court of common pleas; that the said Sarah never executed said receipt, nor authorized any one else to execute the same for her, and that the defendant never paid the said Sarah said sum of \$3,132.17, or any part thereof. Wherefore the plaintiffs asked that the order of the common pleas court discharging the defendant from further duties as guardian of the said Sarah might be set aside, and demanded judgment for said sum of \$3,132.17, with interest thereon. Copies of the said order of the common pleas court, made on the 10th day of May, 1869, of the receipt purporting to be executed by the said Sarah, and of the order of said court finally discharging the defendant as guardian, were filed with the complaint, and referred to as exhibits in the cause.

Error is assigned upon the overruling of the demurrer to the second paragraph of the complaint. In the argument upon the sufficiency of this paragraph, frequent reference is made to the exhibits accompanying the complaint, but as these exhibits were of a character which do not become a part of the complaint by being filed with it, the demurrer raised no question upon them, or upon the validity of the proceedings of which they formed a part. *Parsons v. Milford*, 67 Ind. 489. Consequently, in determining whether or not the paragraph of complaint in question was sufficient, we must look only to the averments contained within the paragraph itself, unaided by the exhibits which were filed in connection with it. The obvious inference from the facts averred in the paragraph is, that the plaintiff Sarah was of full age.

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when the defendant made the final settlement, as her guardian, which she sought to have set aside, and that she was under no disability at the time such final settlement was made. When disability is not alleged it will be presumed not to exist, ability being the rule and disability the exception. *Palmer v. Wright*, 58 Ind. 486.

The right to have the final settlement of an executor, administrator or guardian set aside, in certain cases, is conferred by statute, and can only be exercised within a limited time. When, therefore, the complaint shows that the action to have such a settlement set aside has not been commenced in time, it is bad upon demurrer. Angell Limitations, sec. 294; *Hanna v. The Jeffersonville, etc., R. R. Co.*, 32 Ind. 113; *Brown's Adm'r v. Lucas*, 18 Ind. 286; *Potter v. Smith*, 36 Ind. 231.

An action to set aside the final settlement of an executor or administrator must be commenced within three years, and where the party aggrieved is under disability when the settlement is made, then within three years after the disability is removed. 2 R. S. 1876, p. 537, sec. 116.

Settlements made by a guardian have been held to fall within the provisions of the act concerning the settlement of decedents' estates, and hence the same limitation applies to an action to set aside the final settlement of a guardian as does to cases of final settlement by executors and administrators. *The State, ex rel., v. Hughes*, 15 Ind. 104; *Holland v. The State, ex rel.*, 48 Ind. 391.

So long as the final settlement of an executor, administrator or guardian, remains in force, it is to be considered an adjudication of the matters lawfully embraced within it, and as a bar to an action seeking to reopen questions settled by it. *Parsons v. Milford, supra*.

The second paragraph of the complaint failed to make out a case entitling the plaintiffs to relief against the de-

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fendant, and the demurrer to it ought to have been sustained.

As the judgment must be reversed for want of a sufficient complaint, we need not consider other questions discussed by counsel.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

 No. 7888.

LAWLER v. MCPHEETERS ET AL.

PRACTICE.—*Withdrawal of Evidence from Jury.*—*New Trial.*—*Supreme Court.*—Where evidence is permitted, over an objection, to go to the jury, the court reserving the right to withdraw it, which the court afterward does, telling the jury that it was inadmissible, and they should not consider it, a cause for a new trial, alleging the exclusion of such evidence with sufficient particularity to call the attention of the court to the ruling complained of, is sufficient to present the question to the Supreme Court. Nor is it necessary, in such case, that, at the time the exception is taken, a statement of the character or purpose of the evidence should be made.

WITNESS.—*Impeachment of.*—*Contradictory Statements.*—*Evidence.*—While it is necessary, in laying the foundation for impeaching a witness by proof of contradictory statements, that the time, place and persons present shall be given, it is not necessary that the impeaching witness, when called, should be able to swear to the exact date. It is enough if it appear that the impeaching witness is about to speak in reference to the same declaration or conversation to which the attention of the principal witness has been called.

From the Washington Circuit Court.

D. M. Alsbaugh and *J. C. Lawler*, for appellant.

H. Heffren, *J. A. Zaring*, *A. B. Collins* and *S. B. Voyles*, for appellees.

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Lawler v. McPheeters et al.

WOODS, J.—Suit by appellant against the appellees for the alleged balance due on a promissory note. Answer, denial and payment by George McPheeters. Verdict and judgment for the appellees.

The only question made here is whether the court erred in withdrawing certain testimony from the jury. The defendant George McPheeters testified as a witness in behalf of himself and his co-defendants, in support of the plea of payment, and, on cross examination, said: “I was present at the residence of Samuel McClanahan, in Salem, on the 26th of March, 1878. Mr. Lawler, Mr. and Mrs. McClanahan and my mother were there. * * * I did not say, at that time, place, and in the presence of the parties named, in reply to a statement made by Mr. Lawler to Mrs. McClanahan (that it would require her to furnish about \$800, including the \$419.45 already advanced to complete the payments for the land), ‘I think that is about right.’ I heard no such conversation.”

Upon this foundation, laid in the cross examination of said witness, the plaintiff in rebuttal introduced Samuel McClanahan as a witness, and concerning his testimony the record is as follows:

“Ques. Did the defendant George McPheeters, at your house in Salem, on the 26th day of March, 1878, in the presence of Elizabeth McPheeters, Mrs. McClanahan and yourself, say, in reply to the statement made by Mr. Lawler to Mrs. McClanahan, that it would require her to furnish about \$800, including the \$419.45 already advanced, to complete the payment for the land, ‘I think that is about right.’ The witness answered: ‘I can’t recollect whether that is the date; I can’t tell if it was three or six months ago; it was the only time they were ever there together when I was present.’ Here the defendants objected to the witness answering further, unless he could state that the conversation occurred on the 26th day of March, 1878, the exact date fixed by the

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plaintiff in his question to George McPheeters. The court decided that the witness might answer, but notified the parties that his testimony would be withdrawn from the jury, if the court, on further examination, should conclude it was not admissible. The witness then answered: 'George said, "I think that is about right."' Cross-examined: 'Gentlemen, I can not state the day or the month on which that conversation occurred at my house; I paid no attention to the date.' "

The evidence being all in, the court instructed the jury that it had concluded that the testimony of this witness was inadmissible, and the same was withdrawn, and they should not consider it. The plaintiff excepted.

The counsel for the appellees claim that the action of the court as set forth can not be reviewed by this court, because not made a ground for a new trial in the motion therefor. In reference to this subject, the motion for a new trial contains this: "2d. Error of law occurring at the trial, etc., in this, that the court erred in excluding from the consideration of the jury the evidence of Samuel McClanahan, a competent witness, which evidence consisted of a conversation between the plaintiff and the defendant George McPheeters, at the residence of the witness."

This was sufficiently explicit to recall the attention of the court to the ruling complained of, and is, therefore, sufficient to present the question here. It is not, as counsel for the appellees contend, a question arising on an instruction of the court to the jury. Instructions proper are directions in reference to the law of the case; but that which the court said in reference to the testimony under consideration was simply a ruling of the court withdrawing the evidence from the jury, and the motion for a new trial properly referred to it as such. *Stanley v. Sutherland*, 54 Ind. 339. Neither is there anything in the suggestion that the record fails to show the object for which the testimony was attempted to be in-

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troduced, or what facts were expected to be established by the witness. If this witness had not been allowed to give his testimony at all, there would doubtless be pertinency in these considerations; but the testimony having gone to the jury, it was needless to inform the court that it was expected to elicit from the witness that which the witness had already said, and the court having withdrawn the testimony from the jury, an exception to the action of the court is sufficient, without any statement concerning the character or purpose of the evidence.

The testimony so excluded had a direct tendency to contradict, or at least discredit, the testimony of said George McPheeters, in regard to the payments in dispute, and was properly admissible by way of impeachment and in rebuttal. It may possibly be that the appellant was not harmed by the exclusion, and that the result would have been the same with the testimony in, which was ruled out. Counsel should rather have thought of this, when moving the court to the commission of the error. We can not say that the error was harmless. While it is necessary, in laying the foundation for impeaching a witness by proof of contradictory statements, that the time, place and persons present shall be given, it is not necessary that the impeaching witness, when called, shall be able to swear to the exact date. It is enough if it appear, as it clearly did appear in this case, that the impeaching witness is about to speak in reference to the same declaration or conversation to which the attention of the principal witness had been called.

This court has said: "The rule upon this subject is a practical one, and is founded upon clear principles of common sense. The exact time of a conversation it is often impossible to fix, and to require it would be simply to cut off all opportunity of impeachment in such cases. The object to be attained is to call the witness' attention to a particular conversation, so that he may not be taken by surprise. *

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* * Usually, dates are the least efficient of all means which can be used to refresh one's memory of events, and sometimes they afford no aid whatever. Each case depends somewhat on its own circumstances." *Bennett v. O'Byrne*, 23 Ind. 604; *Wilkerson v. Rust*, 57 Ind. 172.

Judgment reversed, with costs, and with instructions to grant a new trial.

ON PETITION FOR A REHEARING.

WOODS, J.—Counsel for the appellees strenuously insist that the excluded testimony of McClanahan had reference only to an expression of opinion by the witness McPheeters, and that the opinion so expressed had no relation to the testimony which McPheeters had given, and that, for these reasons, the ruling of the court in withdrawing the testimony of the said witness was right. Counsel cite *Hopkins v. Stanley*, 43 Ind. 553; *Paxton v. Dye*, 26 Ind. 393. It is true that the alleged expression of McPheeters was in form an expression of opinion, but, under the circumstances shown in evidence, it was a question for the jury, whether it was not equivalent to an admission of fact, that is to say, of the amount then unpaid of the note in suit; and this was the exact subject of dispute and on which McPheeters had testified. The doctrine of *Hopkins v. Stanley*, *supra*, that juries must give positive answers and not opinions in response to special interrogatories, as we conceive, has no bearing on the subject; and, upon the facts of the case, *Paxton v. Dye*, *supra*, supports our conclusion.

Petition overruled, with costs.

Heizer v. Kelly.

No. 7547.

HEIZER v. KELLY.

73	582
183	890
73	582
150	312
151	533

PRACTICE.--*Transcript.—Statute Construed.*—The phrase in section 559 of the code, “all papers pertaining to a cause, and filed therein,” embraces the complaint, answer, reply, demurrers, and all instruments upon which the proceeding is based, and which are filed with and made part of such proceeding.

SAME.—*Record on Appeal.*—Under section 556 of the code, where the question arises upon sustaining or overruling a demurrer to the complaint, the record on appeal need not contain any subsequent pleading; but if the question arises upon sustaining or overruling a demurrer to the reply, then the complaint, answer and reply must be embraced in the record.

SAME.—*Transcript.—Complaint.*—It is necessary, in every case, for the transcript on appeal to the Supreme Court, to contain a copy of the complaint where the question arises upon the pleadings, unless reserved under section 347 of the code, to present such question for the consideration of the Supreme Court.

SAME.—It is not error to sustain a demurrer to a good reply, where there is no complaint on file; and striking out portions of such reply was harmless, whether it remained good or bad.

SAME.—*Amended Complaint.—Exhibits.*—A complaint, to which a demurrer has been sustained at one term of the court, can not be treated as an amended complaint by simply filing exhibits at the next term, without also refileing such complaint therewith.

From the Marion Superior Court.

F. M. Finch and *J. A. Finch*, for appellant.

J. T. Lecklider, *S. Claypool*, *H. C. Newcomb* and *W. A. Ketchum*, for appellee.

BEST, C.—This action was brought by the appellant against the appellee, Catharine and Solomon B. Davinish, Mark Losey, Harry H. Eckles and Mattie B. Spence, on the 23d day of November, 1876, to foreclose a mortgage.

At the May term, 1877, the court sustained the demurrer of the appellee to appellant's complaint, and at the September term, 1877, the appellant filed an amended complaint, but it is not in the record, and the clerk says it is “not on file.” The appellee filed an answer to the amended complaint, in four paragraphs, all of which were subsequently withdrawn, except the third. To this answer the appellant

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replied in four paragraphs, and then withdrew all of them, except the amended third, and dismissed the action as to all the defendants, except the appellee. The appellee moved the court to strike from the reply certain portions of it, which motion was sustained, and to which ruling appellant excepted. The appellee then demurred to the reply, for want of sufficient facts. This demurrer was sustained, and an exception was reserved.

The appellant declining to further plead, final judgment was rendered against her, from which she appealed to the general term, assigning as error there: First, that the court erred in striking out portions of the reply; second, that the court erred in sustaining the demurrer to the reply; and, third, that the court erred in rendering final judgment against her.

At the general term the judgment of the special term was affirmed, from which judgment appellant appeals to this court, and assigns as error here the ruling of the court at general term, in affirming the judgment rendered at the special term.

We learn from the answer, from the amended third paragraph of the reply, and from the brief of appellant, that the question sought to be raised by this record is this: Can the endorsee of one of several notes secured by the same mortgage, which had been duly recorded, foreclose the same against a person who, after said note was transferred, and after an entry of satisfaction of said mortgage had been made of record, but before March 6th, 1877, purchases the premises embraced in said mortgage in good faith, for full value, and without actual knowledge that the same is unpaid, if such entry were made by the mortgagee without the knowledge, consent, or authority of the holder of said note? This question is an important one; but the appellee insists that because the complaint is not in the record, the question is not presented, and we must, therefore, determine whether or not the record presents it.

In order to obtain relief from a judgment by the aid of

Helzer v. Kelly.

an appellate court, it is necessary that the error should affirmatively appear from the record. This can not appear until the record has been procured and filed in this court, in pursuance of the statute regulating appeals. Section 559 provides that "All proper entries made by the clerk, and all papers pertaining to a cause, and filed therein, * * * are to be deemed parts of the record."

This court has often decided that the phrase, "all papers pertaining to a cause, and filed therein," embraces the complaint, answer, reply, demurrers and all instruments upon which the proceeding is based, and which are filed with and made part of such proceeding. *Kesler v. Myers*, 41 Ind. 543.

In Buskirk's Practice, p. 142, it is said that "The complaint, answer, reply, demurrers thereto, the rulings of the court thereon, and the exceptions thereto, constitute a part of the record by force of the statute." With this construction, the record in a given case must at least embrace all proper entries made by the clerk, the complaint, answer, reply and all instruments upon which either is based, when filed with and made a part of it, if such pleadings are filed in such case. The complaint, then, is a part of every record, and if it were necessary to procure a transcript of the whole of any record, in order to appeal, an appeal could not be taken unless the transcript embraced the complaint. This, however, is not required. Section 556 provides that "such appeals may be taken by procuring from the clerk of the court a transcript of the record, and proceeding in the suit, or so much thereof as is embraced in the appeal, and filing the same in the office of the clerk of the supreme court." This statute authorizes an appeal to be taken by procuring so much of the record as is embraced in the appeal. This is manifestly less than the whole. It is a part, but what part? The phrase, "so much of the record as is embraced in the appeal," does not determine it. It is broad enough to embrace all that may be deemed necessary to present any given ques-

Heizer v. Kelly.

tion, and it evidently means so much thereof as will present the question sought to be raised; but what part? This depends upon the question sought to be raised. If the question arises upon sustaining or overruling a demurrer to the complaint, the record need not contain any subsequent pleading. The converse of this, however, is not true. If the question arises upon sustaining or overruling a demurrer to the reply, then the complaint, answer and reply must be embraced in the record, as the demurrer searches all previous pleadings; and, unless the complaint is in the record, it would be impossible to say that the ruling of the court upon the sufficiency of a subsequent pleading was erroneous. It seems to us that it is necessary, in every case, for the transcript to contain a copy of the complaint, where the question arises upon the pleadings, unless, perhaps, it is reserved under section 347 of the code. It is the basis of the action, the foundation of the superstructure, and without it no error can appear.

In Buskirk's Practice, at page 66, it is said, that, to present a question upon a demurrer to the reply, the "transcript will consist of the complaint," etc.; and it is obvious that, if a demurrer to the reply reaches the complaint, the complaint must be included in the transcript, in order to determine the correctness of the ruling on the demurrer. That it does, has already been decided by this court. *Freeman v. Robinson*, 7 Ind. 321; *Meniffee v. Clark*, 35 Ind. 304.

In the case last cited, it is said that "The demurrer brings in review the whole series of pleadings in all its preceding stages, and the court must give judgment against the party who has committed the first available fault." If a demurrer to a good reply should be sustained, because the complaint is defective, certainly there is no error in doing the same thing where there is no complaint at all.

What we have already said substantially disposes of the objection made to the action of the court in striking out portions of the reply. If a good reply could do the appel-

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lant no good, striking out portions of it could do him no harm, whether it remained good or bad.

For these reasons we think the question sought to be raised is not in the record, and the judgment ought, therefore, to be affirmed.

PER CURIAM.—It is therefore ordered upon the foregoing opinion, that the judgment below be, and it is hereby, in all things affirmed, at the costs of appellant.

ON PETITION FOR A REHEARING.

BEST, C.—The appellant concedes that the conclusion reached by the court is correct, unless the complaint filed November 23d, 1876, can be treated as the amended complaint filed September 13th, 1877. How this can be done is not indicated. She says that the truth is that the exhibits were not filed with the original complaint, to which, for such reason, a demurrer was filed and sustained, on the 12th day of April, 1877; that these exhibits were filed on the 13th day of September, 1877, and that the original complaint and the exhibits thus became the amended complaint. If this version is correct, the clerk, in making the transcript, made two mistakes—one in setting out the exhibits as filed with the original complaint, and the other in not setting them out as filed September 13th, 1877. If both were corrected, however, the correction could not avail the appellant. A complaint to which a demurrer has been sustained at one term of the court can not be treated as an amended complaint by simply filing exhibits at the next term, without also refiling such complaint with such exhibits.

The appellant also insists that the appellee filed his answer to this complaint, and, since he treated it as an amended complaint, the court must also so treat it. This we would willingly do if the record supported the statement, but it does not. The demurrer to the original complaint was sus-

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tained April 12th, 1877, and on the 13th of September following this entry was made: "Comes now the plaintiff by her attorneys, and files an amended complaint herein, to which defendants are ruled to answer." And on September 15th occurs this entry: "Comes now defendant Joseph M. Kelly and files his answer in five paragraphs." These entries are conclusive, and the conclusion that the answer was filed to the amended complaint, and not to a complaint to which a demurrer had been sustained at a previous term of the court, seems unavoidable. *Eisman v. Poindexter*, 52 Ind. 401. We have no power to correct the record, nor can we disregard its recitals; therefore we adhere to the ruling in the original opinion.

PER CURIAM.—The petition is overruled

 No. 7136.

MONCRIEF, EXECUTOR, v. MONCRIEF ET AL.

73	587
126	390
73	587
155	263
155	264

DECEDENTS' ESTATES.—*Debts of Testator.*—*Devisee.*—The devisee of land and his grantee take it subject to the payment of the testator's debts.

SAME.—*Executor.*—*Sale of Land.*—It is an executor's duty to apply to the proper court for an order for the sale of land to pay debts when necessary, and it is proper to order a sale on his petition whenever it would be on the petition of creditors.

SAME.—*Administrator's Consent.*—*Creditor's Right.*—*Estoppel.*—*Case Overruled.*—The consent of the administrator to the sale of the land by the heir can not divest the creditor of his right to have his debt made out of the land, although such consent might estop him, were the rights of creditors not affected. *Pell v. Farquar*, 3 Blackf. 331, overruled on this point.

From the Jennings Circuit Court.

T. C. Batchelor, for appellant.

G. W. Swarthout, for appellees.

Moncrief, Executor, v. Moncrief *et al.*

WORDEN, J.—This was a petition filed by the appellant, as executor of the last will and testament of Caleb Moncrief, deceased, in the court below, for an order for the sale of certain real estate for the payment of the debts of the deceased. It is stated in the petition that the testator died the owner of certain real estate, described, situate in Jennings county; that he left no personal estate whatever; that he owed debts on which there was due at the time of filing the petition about the sum of three hundred dollars, together with the costs of administration, which will probably amount to one hundred dollars.

The will of the testator contains the following clauses:

“*First.* All my just debts are to be paid.

“*Second.* I give and bequeath to my beloved wife, Jane Moncrief, all my estate, real and personal, of which I may die seized or possessed, during her natural life.

“*Third.* After her death, I give and bequeath all my real and personal estate to my son, Maxa Moncrief.”

The testator died, as is alleged, in January, 1870. The following allegations are found in the petition: “That on the — day of October, 1870, the said Maxa Moncrief sold and conveyed to the defendant George W. Swarthout all of the real estate above described, which was all the real estate left by said decedent, the said Swarthout at the time well knowing that the debts of said decedent had not been paid, and that there was no personal property belonging to said estate, out of which to pay the same; that, at the time of said conveyance to said George W. Swarthout, the estate of said Caleb Moncrief was, and still is, indebted in the sum of \$300 and more; that to pay said indebtedness it has become necessary to sell a portion or all of said real estate,” etc.

Swarthout and his wife were made defendants to the petition, and the fifth paragraph of their answer was as follows:

“For fifth paragraph of amended answer defendants say that plaintiff ought not to have his order of sale, as prayed

Moncrief, Executor, v. Moncrief et al.

for in his petition, in this, that plaintiff having paid the legacies mentioned in the will of the testator, to the sole heir and legatee of the same, Maxa Moncrief, by delivering up to him and permitting him to take possession of the real estate in plaintiff's petition mentioned, and permitting him to treat and use the same as his own ; whereby said heir and sole legatee had a right to sell and convey the same. Defendants aver that they purchased said real estate from said heir and legatee, as they had a right to do, in good faith, without any knowledge that there were any debts unpaid against said estate ; that they paid a full valuation therefor, to wit, \$5,000 ; that part of the purchase - money was in property, to wit, the undivided half of a large steam flouring mill and dwelling-house, together with the land on which the same is situated, in Geneva township, Jennings county, Indiana, worth \$4,000, which property said heir and sole legatee was the owner and in possession of at the commencement of this suit, and out of which this plaintiff could have made the money to pay all the debts against the estate, but plaintiff wholly failed and neglected so to do ; that, soon after said sale and purchase of the mill aforesaid, this plaintiff made an agreement with the heir and legatee to go into partnership with him in running and occupying the mill for their mutual benefit, but this plaintiff having failed to get his means or money together to do so, plaintiff arranged with one William G. Stratton to go into partnership with the heir and sole legatee, Maxa Moncrief, in running and occupying said mill, until the plaintiff could get his money collected together to do so ; that the remaining \$1,000 was paid as follows : \$463 paid off a mortgage to the school fund against said land ; the remainder was divided into three equal payments in one, two and three years, defendant giving his note therefor. The first payment was paid to Maxa Moncrief, the heir and legatee aforesaid and payee of the notes. The remaining two were assigned to one William G. Stratton,

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and by him to one Hiram T. Read, a creditor for a large amount of Maxa Moncrief, heir, etc., aforesaid, for the purpose of preventing this defendant from buying up any offsets against said notes in the hands of the payee; all of which facts this plaintiff well knew and consented to. That defendant was asked by said Read if said notes were all right; defendants told him they were, but at the same time told him he would not pay them until the debts against the estate of Caleb Moncrief were settled. That at the ——— term of this court, and before said notes were paid to said Read, defendant asked this plaintiff if he required defendant to pay those notes to him as assets to pay debts; he answered that he did not need the money to pay debts against said estate; this plaintiff then and there answered defendant that he did not, that he had the debts all arranged, and that defendant could pay the money to said Read; all of which facts this plaintiff well knew. Defendants aver that plaintiff connived with the heir and sole legatee, Maxa Moncrief, to convert and appropriate the property, both personal and real estate, belonging to said estate, to his own [use], as against the creditors of said real estate. Wherefore, in consequence of all of which facts and negligence on the part of the plaintiff, defendants ask judgment, that plaintiff do not have his order of sale, as prayed for in his petition, and that defendants have judgment for costs.”

A demurrer to this paragraph, for want of sufficient facts, was filed by the plaintiff, and overruled; exception. Issue; trial by the court; finding and judgment for the defendants.

The correctness of the ruling on the demurrer above mentioned is questioned by an assignment of error. We are of opinion that the demurrer to the fifth paragraph of answer should have been sustained. The devisee of the land, and the purchaser from him, Swarthout, took it subject to the payment of the debts of the testator. *Weakley v. Conradt*, 56 Ind. 430.

Moncrief, Executor, v. Moncrief *et al.*

There is nothing in the paragraph of answer that estops the creditors of the testator from instituting proceedings for an order for a sale of the land, by the executor, for the payment of their debts. 2 R. S. 1876, sec. 78, p. 523. There is, therefore, nothing that estops the executor from procuring such order of sale. It would be quite incongruous to hold that the executor could be authorized to sell on the petition of creditors, and not on his own petition. It is his duty to apply to the proper court for an order for the sale of land to pay debts, when necessary, and it is proper to order a sale on his petition whenever it would be on the petition of creditors. The executor is a trustee, invested with the power, in a proper case and on the order of the proper court, to convert real estate into money for the benefit of the creditors of the estate; and the acts charged in the paragraph of answer, while they might estop him were the rights of creditors not affected, can not estop him as executor to do and perform such duties as may be necessary and proper for the payment of the debts of the estate.

It is alleged in the paragraph, among other things, that "plaintiff connived with the heir and sole legatee, Maxa Moncrief, to convert and appropriate the property, both personal and real estate, belonging to said estate, to his own use as against the creditors of said estate."

If this allegation means that the plaintiff was guilty of a *devastavit*, still, as between the heir or devisee and the creditor, the loss must fall on the former, and not the latter. *Nettleton v. Dixon*, 2 Ind. 446. The creditors of the estate might perhaps maintain an action for a *devastavit* against the executor and his sureties upon his bond; but they can not be driven to that remedy for the collection of their debts.

Our attention has been called to the case of *Pell v. Farquar*, 3 Blackf. 331, in which it was said that, "If an administrator consent to the sale, by heirs, of the real estate of the intestate, he divests himself of any right, which he

 Sprinkle *v.* Toney *et al.*

might otherwise have had under the statute, to make such estate assets, in case of a deficiency of the personal property." This proposition, we are satisfied, is founded in error, inasmuch as the consent of the administrator to the sale of the land, by the heir, could not divest the creditor, in the case supposed, of his right to have his debt made out of the land, and this right may be worked out by an order for the sale of the land made on the petition of the administrator as well as on the petition of the creditor. The case above cited, upon the point stated, must be overruled.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to sustain the demurrer to the fifth paragraph of answer.

Opinion filed at November term, 1880.

Petition for a rehearing overruled at May term, 1881.

73 509
126 588

 No. 7523.

SPRINKLE *v.* TONEY ET AL.

APPEAL.—Amount in Controversy.—Dismissal.—In an action originating before a justice of the peace, where the amount of recovery is less than fifty dollars, with which the plaintiff is content, an appeal therefrom to the Supreme Court, by the defendant, will be dismissed under sec. 550 of the code, as amended by the act of March 14th, 1877, Acts 1877, Spec. Sess., p. 59.

From the Cass Circuit Court.

M. Winfield, for appellant.

D. P. Baldwin and *D. D. Dykeman*, for appellees.

ELLIOTT, J.—This action originated before a justice of the peace, where trial was had, and judgment rendered for the appellee Toney for \$45.50. Appellant appealed to the cir-

Redman v. Marvil, Administrator.

cuit court, where a trial was had and a verdict and judgment rendered, on the 25th day of January, 1878, in favor of appellee, for forty-five dollars. Trial was had since the act of March, 1877, went into force; the amount in controversy is less than fifty dollars; the action originated before a justice of the peace, and, therefore, this appeal will not lie.

It is true that the complaint claims eighty dollars, but the judgment appealed from was for forty-five dollars, and with it the appellee was content. The only amount in controversy, therefore, is the sum of forty-five dollars. The appellee is claiming the payment of that sum and no more, and the appellant is simply resisting payment of that sum, for nothing is claimed by way of counter-claim or set-off. If the appeal fails, the appellee can get no more than forty-five dollars, interest, and costs; if it succeeds, the appellant escapes payment of that sum, interest and costs. *Halleck v. Weller*, 72 Ind. 342.

The appeal is dismissed, at the costs of appellant.

Opinion filed at November term, 1880.

Petition for a rehearing overruled at May term, 1881.

No. 8280.

REDMAN v. MARVIL, ADM'R.

JOINT PROMISSORY NOTE.—*Death of Surety.—Decedents' Estates.—Statute Construed.*—Under section 783, 2 R. S. 1876, p. 309, the death of a surety on a joint promissory note does not discharge his estate from liability thereon.

From the Gibson Circuit Court.

W. M. Land, C. A. Buskirk and J. W. Ewing, for appellant.

Redman v. Marvil, Administrator.

J. E. McCullough, L. C. Embree and M. W. Fields, for appellee.

MORRIS, C.—The appellant sued the appellee, as administrator of Newton A. Wasson, and one James L. Wasson, upon a note for \$341.50, executed to him by the said James L. and Newton A. Wasson jointly, but not jointly and severally.

The parties were duly served with process. James L. Wasson made default, and the appellee answered the complaint in two paragraphs: 1st, the general denial; 2d, that Newton A. Wasson, appellee's intestate, executed the note as the surety of James L. Wasson; that he received no part of the consideration for which it was given, and died before the commencement of this suit, leaving the said James L. Wasson, the principal maker of the note, surviving him.

The appellant demurred to the second paragraph of the appellee's answer, on the ground that it did not state facts sufficient to constitute a defence to the action. The court overruled the demurrer, and the appellant excepted.

The appellant then dismissed the suit as to James L. Wasson, refused to reply to the second paragraph of the appellee's answer, and judgment was rendered against him, and in favor of the appellee, for costs. Redman appealed to this court, and assigns as error the ruling of the court below upon the demurrer.

The question presented for decision here is, was the estate of Newton A. Wasson, upon the facts stated in the second paragraph of appellee's answer, liable on the note sued upon? It is conceded, that, at common law, the estate of Newton A. Wasson would not be liable; but the appellant insists that this rule of the common law has been changed by section 783 of the code.

In the case of *McCoy v. Payne*, 68 Ind. 327, decided since this appeal was taken, this precise question was decided, the court holding that the estate of the deceased joint

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maker of a note is liable. See, also, *Hudelson v. Armstrong*, 70 Ind. 99. We approve this decision, and conclude that the judgment below should be reversed.

PER CURIAM.—It is ordered by the court, that, upon the foregoing opinion, the judgment below be, and the same is in all things hereby, reversed, at the costs of the appellee, and this cause is remanded for further proceedings.

No. 8164.

MATHER v. SIMONTON.

SPECIFIC PERFORMANCE.—*Contract to Open Street.*—A suit to compel specific performance of a written agreement to open a public street in an addition to a town is not the proper proceeding to remove an obstruction in such street.

SAME.—*Complaint.*—*Special Injury.*—*Separate Right of Action.*—The facts and circumstances showing the nature and extent of a special injury, which gives a separate right of action under a contract, ought to be stated in the complaint.

SAME.—*Jurisdiction.*—The jurisdiction of a court to compel specific performance of contracts exists only when injury is shown, and when it appears also that a remedy at law by compensation in damages would not be adequate.

From the Elkhart Circuit Court.

J. M. Vanfleet and *E. C. Bickel*, for appellant.

J. D. Osborne and *E. G. Herr*, for appellee.

BICKNELL, C.—This was a suit to compel specific performance of a contract. The complaint alleges that the appellant and appellee and five others severally owned lands in the corporate limits of the town of Elkhart, and, in 1866, each, for himself and his assigns, agreed, in writing, with

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the others and their assigns, to lay out and annex to the town of Elkhart an addition embracing said lands, in accordance with a plat annexed to said writing, and that certain named streets of said town should be extended over said lands and opened immediately; that certain other named streets should be opened, not using the word "immediately," and that some of the streets to be opened immediately should be further extended within two years, and again extended and opened still further as soon as the owners of the territory and the demand for sale and improvements should require, and that as soon as this last extension should be made, then certain other named streets should be opened, and that, in the laying out of streets and alleys, reference should be had to the plat aforesaid. The complaint further avers that all the parties opened the streets over their lands in accordance with the agreement except the appellee, who owns the land over which Fifth street would pass, from an alley between Marion and Harrison streets to Harrison street; that said Fifth street was unenclosed a year after the date of the agreement, but, in 1876, ten years after that date, the appellee, in violation of said agreement, put a fence across the south end of Fifth street, along the north line of Harrison street, thereby closing up Fifth street, "to the great damage of the appellant, and although often requested has refused, and still refuses, to open said street." The complaint prays that the appellee may be compelled to open said street, and may be forever enjoined from closing the same, and that the appellant may recover \$100 damages, and may have all other proper relief.

A demurrer to the complaint, for want of sufficient facts, was sustained, and final judgment was rendered against the appellant. The error assigned is that the court erred in sustaining the demurrer.

Although Fifth street is marked on the plat, yet the contract, which expressly names the streets to be opened, and

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declares when and how far they shall be opened, makes no such provisions as to Fifth street. Fifth street is not mentioned in the writing.

It will be observed, also, that there is no statement in the complaint of any special damage sustained by the appellant; it is not shown in what way he is injured. If Fifth street is a public street, a proceeding of this kind is not the proper way to remove an obstruction in it. If Fifth street is not a public street, but was included in the contract, and if the appellant has received some special injury by its enclosure, which gives him a separate right of action under the contract, then the facts and circumstances showing the nature and extent of the injury ought to be stated in the complaint. The jurisdiction of the court to compel specific performance of contracts exists only when injury is shown, and when it appears also that a remedy at law by compensation in damages would not be adequate. *Adderley v. Dixon*, 1 Sim. & S. 607; *Chamberlain v. Blue*, 6 Blackf. 491. The court below committed no error in sustaining the demurrer to the complaint, and its judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things affirmed, at the costs of the appellant.

No. 7502.

PARKER v. PITTS.

PROMISSORY NOTE.—*Execution on Sunday by Surety Void.*—The execution of a promissory note as surety on Sunday, though delivered by the principal on a week day to the payee, who had no knowledge that the note had been so signed by the surety, is void.

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SAME.—Ratification.—Where a surety on a note signed by him on Sunday, after it becomes due, notifies the payee that the principal had certain property he might sell and apply on the note, and afterward requests the payee not to sue on the note until he could see the principal, no part of the consideration having been received by the surety, such facts are insufficient to show a ratification of the execution of the note by him.

From the Posey Circuit Court.

E. M. Spencer, for appellant.

W. P. Edson, appellee.

NIBLACK, C. J.—This action was commenced before a justice of the peace, by Joseph Pitts, against Samuel Stallings and James M. Parker, upon a promissory note for one hundred and fifty dollars.

Stallings made default. Parker defended upon the ground that he executed the note on Sunday, and at the trial the justice found in favor of the plaintiff, and rendered judgment against both of the defendants.

Parker alone appealed to the circuit court, where, upon a trial by the court, there was a finding and judgment against him, for a balance found to be due upon the note.

Parker has still further appealed to this court and insists that the finding of the court below was not only not sustained by sufficient evidence, but was against both the law and the evidence.

It appeared, from the evidence, that, on the Sunday previous to the delivery of the note to the plaintiff, Stallings, the co-defendant before the justice, being the principal in the note and too unwell to go himself, sent his wife with the note, which was dated upon another and a business day, to Parker's house, for the purpose of getting Parker to sign the note as surety for him, said Stallings; that Parker, who was unable either to read or write, thereupon, on that Sunday, signed the note as such surety, in the presence of Mrs. Stallings, by making his mark thereon, and as thus signed

Parker v. Pitts.

gave it back to Mrs. Stallings, without any directions as to its delivery, or in any other respect; that Mrs. Stallings then returned home with the note and on the same day gave it to her husband; that Parker had no conversation with any one else about the execution of the note and gave no one else any direction concerning its delivery; that after the note became due the plaintiff came to see Parker about the payment of it, and Parker then told the plaintiff that Stallings had some hogs which he might sell and apply on the note; that the plaintiff afterward saw Stallings, and he sold hogs and paid a portion of the note; that afterward the plaintiff met Parker in the road, when Parker inquired how he and Stallings were getting along with the note; that the plaintiff replied that he could not wait much longer; that Parker then said, "Don't sue until I can see Stallings;" that the plaintiff did not know that Parker had signed the note on Sunday until after suit had been brought upon it.

We have no brief from the appellee, and hence no suggestion from him as to any ground upon which the judgment in this case might be sustained.

This court has several times held that the execution of promissory notes, and other written obligations, on Sunday, under circumstances similar to those disclosed in the evidence in this case, was void, and, in obedience to the evident weight of authority, we feel constrained to adhere to the rule thus recognized as applicable to such contracts in this State. *Davis v. Barger*, 57 Ind. 54; *Gilbert v. Vachon*, 69 Ind. 372.

As none of the consideration was received by Parker, we can not say that what occurred between him and the plaintiff, after the note became due, tended in any manner to show a ratification by Parker of the execution of the note. *Banks v. Werts*, 13 Ind. 203; *Catlett v. The Trustees, etc.*, 62 Ind. 365; *Kountz v. Price*, 40 Miss. 341; *Myers v. Meinrath*, 101 Mass. 366; *Ryno v. Darby*, 5 C. E. Green, 231; *Finn v. Donahue*, 35 Conn. 216; *Pate v. Wright*, 30 Ind. 476;

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Bradley v. Rea, 103 Mass. 188 ; *Day v. McAllister*, 15 Gray, 433 ; *Pope v. Linn*, 50 Me. 83 ; *Ladd v. Rogers*, 11 Allen, 209 ; *Hazard v. Day*, 14 Allen, 487 ; *Reeves v. Butcher*, 2 Vroom, 224. Also, see, *Perkins v. Jones*, 26 Ind. 499 ; *Reynolds v. Stevenson*, 4 Ind. 619 ; and *Link v. Clemmens*, 7 Blackf. 479.

The judgment is reversed, with costs, and the cause remanded for a new trial.

Opinion filed at the November term, 1880.

Petition for a rehearing overruled at the May term, 1881.

No. 8150.

HEADY v. BECK.

From the Hamilton Circuit Court.

W. Garver, R. Graham, J. H. Laird, G. W. Winpenny and J. W. Walker, for appellant.

D. Moss and R. R. Stephenson, for appellee.

FRANKLIN, C.—This was a suit brought by appellant against appellee, as the widow of James L. Beck. The plaintiff alleged, in his complaint, that judgment had been rendered in the Hamilton Circuit Court against said James L. Beck, in his lifetime, as principal, and appellant as surety, on a guardian's bond, for \$400; that Beck was insolvent; and that he, as such surety, had paid the judgment; that said Beck afterward fraudulently purchased a certain twenty acres of land, and procured the deed to be made to his wife, the appellee; that the wife had full knowledge of the fraud, and paid nothing for the land. And praying that the deed be set aside as fraudulent, and that his claim be declared a lien upon said land.

The defendant answered:

1st. By a denial.

2d. That she had paid in full for the land with her own individual funds, and stating the sources whence she derived them, had made the purchase herself, and had caused the deed to be executed to her.

The plaintiff filed a demurrer to the second paragraph of defendant's answer, assigning as a cause, that it did not state facts sufficient to constitute a defence; which was overruled by the court, and excepted to by the plaintiff, and he then filed a reply in denial.

Trial by jury commenced, and, upon the conclusion of the evidence of the plaintiff, the defendant filed a demurrer to the plaintiff's evidence setting forth all the evidence that had been given. The court sustained the demurrer to plaintiff's evidence, and the plaintiff excepted.

Appellant has filed in this court the following assignment of error:

Jonas v. Jonas.

"The court erred in sustaining the demurrer of appellee to the evidence."

Appellee filed the following cross assignment of errors:

"1st. That the appellant's complaint does not state facts sufficient to constitute a cause of action against her.

"2d. That the court below had no jurisdiction of the subject-matter of the action."

We have carefully examined the evidence given by the plaintiff, and find nothing therein which would justify the jury in reasonably finding that any portion of the consideration money for the land was paid with the funds of said James L. Beck. That there was no error in the court's sustaining the demurrer to plaintiff's evidence.

PER CURIAM.--It is therefore ordered that, upon the foregoing opinion, the judgment below be, and is hereby, in all things affirmed, at appellant's costs.

No. 7537.

JONAS v. JONAS.

From the Jackson Circuit Court.

R. Hill and J. W. Nichol, for appellant.

J. B. Brown and W. K. Marshall, for appellee.

MORRIS, C.—The complaint states, among other things, that the appellant and appellee were married in 1850; that they cohabited together as husband and wife until 1870, when, because of the misconduct of the husband, she was compelled to abandon him; that they had born to them six children; that afterward the appellant procured, in the Court of Common Pleas of Decatur county, a divorce from the appellee, five thousand dollars as alimony, and that she was awarded the custody, maintenance and education of the three younger children, but that no provision was made by the court for the support of said children. The appellant further says that the children so awarded to her were young, and unable to support themselves; that she has kept them in school most of the time, has supported them, and in so doing has necessarily expended the entire sum awarded her as alimony; that she is poor and without means. She further states that when she and the appellee were married, they were poor; that he is now worth \$50,000, most of which was accumulated while they lived together as husband and wife, and by their joint efforts. She avers that her support of the children was worth one thousand dollars per year, and that their future support for some time will be worth a like sum per year. She demands judgment for \$10,000.

The appellee demurred to the complaint. The demurrer was sustained, and the appellant excepted.

The question raised in this case was fully considered and exhaustively discussed in the case of *Husband v. Husband*, 67 Ind. 583, and decided adversely to the appellant.

The judgment below ought to be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be, and the same is hereby, affirmed, at the costs of the appellant.

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Held, that said E. and B. were arbitrators, and not referees merely, and such proceeding was a statutory arbitration, and the award a statutory one.

Held, also, that the court could not confirm such award and render judgment thereon until such submission, and award had been entered of record, and a rule thereon to show cause had been duly granted and served, as provided in section 13 of the arbitration act; and, until such confirmation, such award remained *in fieri*, and no valid judgment could be rendered thereon. *Healy v. Isaacs, 226*

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paid to A. upon the condition that the said judgment should be finally determined by the Supreme Court of the State, B. knowing that no appeal had ever been taken therefrom. The clerk refusing to pay said sum on demand on account of such condition, A. brought suit to revive the balance of said judgment, and asked for an order for the issuance of an execution thereon against the property of B.

Held, that A. was entitled to execution on his judgment for the unsecured balance due.

Held, also, that an execution on said judgment should only be issued by order of the court rendering the same.

Held, also, that the money left with the deputy clerk was not a payment either to him or to A., but a mere deposit upon a condition.

Held, also, that a creditor of a bankrupt, in the event of the non-payment of the composition according to its terms, is remitted to all the rights which he had at the time the proceedings in bankruptcy were instituted.

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Held, that the complaint therein must show, as against the sureties, that a successor to such constable had not been elected and qualified.

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M. & Co., it will include a note afterward given on an account accruing after the execution of such bond, by the principal to said M. & Co., and the fact that such note was antedated, but dated subsequent to the execution of the bond, and made payable twelve months after date, does not release the surety on such bond.

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attorneys employed by the old board filed a complaint in the circuit court, praying for a mandate against the auditor of the county to compel him to issue his warrant in favor of the treasurer of the old board for the money then in his hands belonging to said school city. The object of this suit was to determine who were the legal school trustees. The order of May 31st, for the employment of said attorneys, was never revoked by the new board.

Held, that such order only authorized the employment of said attorneys to prosecute the county auditor, for failing to pay over the money due from him to the school city, and not to bring a civil suit to try the question as to who were the legal trustees, and that the school city was not liable for the fees of said attorneys for such services.

Baldwin v. School City of Logansport, 346

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Held, that the whole instruction, taken together and in connection with the evidence, is substantially correct. *Ib.*

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1. *Breach.—Damages.—Pleading.—Penalty.—Real Estate.—Description.—Conveyance.*—P. executed a written contract to N., wherein he agreed to convey to him certain described land in Hardin county, Ill., if not then disposed of by parties with whom it was left for disposition; and if so, in lieu thereof, to convey to N. "one hundred and sixty acres of land in any one of the following counties in the State of Missouri, viz.: * * * Now, should the said P. fail to comply with the above contract, he forfeits the sum of one thousand dollars to the said N." Suit by N. for breaches of such contract.

Held, that such sum was the penalty named to secure a performance of the contract by P., and N. could only recover by showing a failure to perform and a loss resulting.

Held. also, that a complaint on such contract, to show a failure of performance in respect to the land in Hardin county, must aver that it had not been disposed of when such contract was executed.

Held. also, that the right to demand a conveyance of the land in Missouri could not be enforced, as the contract with reference thereto was invalid for want of a description. *Newman v. Perrill*, 153

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CORPORATION.

See FALSE IMPRISONMENT, 1, 2.

Defective Organization.—*Right to Enjoy Corporate Franchises.*—*Contract.*—*Estoppel.*—Where one contracts with an association, as a corporation, he is estopped from afterward denying its legal existence as such. And where there has been an attempt to create a corporation, and the statute has been in part complied with, and there has been an assertion and exercise of corporate powers, the right of such organization to possess and enjoy corporate franchises, and to hold real estate, can not be litigated in an action instituted by an individual citizen, but only in a direct proceeding therefor, brought in the name of the State. *Baker v. Neff*, 68

COSTS.

See JUDGMENT, 6 to 8, 10; SUPREME COURT, 15.

COUNTY CLERK.

See CRIMINAL LAW, 3.

COUNTY COMMISSIONERS.

See DITCHES AND DRAINS, 1; JURISDICTION, 2; LIQUOR LAW, 5; SUMMONS, 2.

1. *Appeal.*—*Board of Commissioners.*—*Town.*—*Incorporation of.*—Under the act for the incorporation of towns, 1 R. S. 1876, p. 874, no appeal can be taken to the circuit court from the order of the board of commissioners incorporating a town. *Baltimore, etc., R.R. Co. v. Board, etc.*, 213
2. *Same.*—*Cases Modified.*—Under section 31 of the act in relation to county boards, 1 R. S. 1876, p. 357, an appeal may be taken to the circuit court by any person aggrieved, from all decisions of the board of commissioners, *except* in cases or proceedings where an appeal is expressly denied, or where an appeal is impliedly denied by force of a provision in the statute under which the particular case or proceeding may be had, that the order or decision of such board shall be final or conclusive. *Allen v. Hostetter*, 16 Ind. 15, and *Hanna v. The Board, etc., of Putnam County*, 20 Ind. 170, modified on this point. *Id.*

COVERTURE.

See HUSBAND AND WIFE; MARRIED WOMAN, 2.

CRIMINAL LAW.

See CITIES AND TOWNS, 5 to 8; DAMAGES, 5; LIQUOR LAW; NUISANCE, 1 to 3.

1. *Nuisance.—Affidavit.—Pleading.*—An affidavit and information, or an indictment, for maintaining a nuisance, must show that it was to the injury of some portion of the citizens of the State. A general conclusion, that it is "to the great injury," etc., "of all the citizens of the State," is insufficient to supply such defect in the body of the pleading. *State v. Houck, 37*
2. *Pleading.—Information.—Minor.—Billiards.*—In a prosecution for permitting a minor to play billiards, the allegation in the information, "which said billiard table he, the said M. H., then and there being the owner of, and then and there having the care, control and management of," is not a mere recital, but a sufficient averment of the defendant's ownership, and that he had the care and management of the table upon which the game was alleged to have been played. *Hipes v. State, 39*
3. *Same.—Affidavit.—Jurat.—Clerk.—Presumption.—Signature.*—The signature, J. S. H., clerk, attesting the affidavit upon which such information is based, on appeal, will be presumed to be the clerk of the circuit court. *Ib.*
4. *Same.—Instruction.*—A defendant, on the trial of such case, is entitled to have a specific instruction given to the jury, applying to the facts of the particular case as developed by the evidence. *Ib.*
5. *Same.*—Where one who has the general management and control of a billiard table is present and allows a minor to play thereon, he is liable to a prosecution, although, at the time, he did not have personal control of such table; and an instruction asked by the defendant limiting his liability to a personal care, management and control thereof, was correctly refused. *Ib.*
6. *False Pretences.—Indictment.*—Where an indictment for obtaining money under false pretences states facts which show that the money was obtained by such false representations as would deceive a man of common intelligence, it is sufficient. *Miller v. State, 88*
7. *Appeal by State.*—Under section 152, 2 R. S. 1876, p. 411, notice of an appeal by the State in a criminal proceeding, served on the defendant in a county other than that wherein the trial occurred, is insufficient. *State v. Quick, 147*
8. *Statutory Offences.—Common Law.*—In this State there are no common-law offences, and criminal prosecutions can only be maintained for offences prescribed by statute; but, where the statute does not specially define the offence, the common-law definition will be adopted. *State v. Berdett, 185*
9. *Duty of Court to Give Instructions.—Hypothetical Case.—Practice.*—While a jury in a criminal prosecution is not bound to follow the instructions given, yet it is nevertheless the duty of the court to instruct them upon the law applicable to the case: and, where an instruction states hypothetically all the facts necessary to constitute an offence, it is proper for the court to give the rule of law applicable to such facts. *Ib.*
10. *Indictment.—Supreme Court.—Practice.*—Where an indictment is apparently good, and no objection thereto is pointed out, the Supreme Court will not consider assignments of error based on the overruling of a motion to quash such indictment, or the overruling of a motion in arrest of judgment. *Martin v. State, 527*

11. *Empanelling Grand Jury.—Venire.—Statute Construed.—Indictment.—Abatement.*—The inhibition contained in the act of March 10th, 1873, 2 R. S. 1876, p. 418, against the clerk issuing, without an order of the judge, a *venire* for the attendance of grand jurors, already properly chosen by the county board, constitutes no restriction on the power of the court to organize the panel from those found in attendance, though they have come in response to a summons issued without the required order; and, where a grand jury is thus organized, it is not, for that reason, illegal, and a plea in abatement by a defendant to an indictment returned by such jury against him was properly overruled. *Hess v. State, 537*
12. *Forgery.—Lost Instrument.—Pleading.*—It is not necessary, in an indictment for forgery, where the instrument forged is alleged to be lost, to show that search therefor had been made by the parties to whom it was uttered. *Ib.*
13. *Description. — Variance.* —Where the indictment describes the lost note as purporting to be signed by "one Henry Wintrode or Henry R. Wintrode," such description is not uncertain or equivocal. *Ib.*

DAMAGES.

See CITIES AND TOWNS, 1; CONTRACT, 1; FALSE IMPRISONMENT, 6, 7; HUSBAND AND WIFE, 4; INJUNCTION, 1, 3; NEGLIGENCE, 1, 5, 11; PLEADING, 14.

1. *Measure of, in Action by Parent for Death of Child.—Railroad.—Negligence.*—In an action by a parent against a railroad company, for negligently causing the death of his infant child, he is entitled to recover only for the pecuniary injury he has sustained. The proper measure of damages is the value of the child's services from the time of the injury until he would have attained his majority, taken in connection with his prospects in life, less his support and maintenance. To this may be added, in proper cases, the expense of care and attention to the child, made necessary by the injury, funeral expenses and medical services. *Pennsylvania Co. v. Lilly, 252*
2. *Same.—Pleading.*—In such action, to enable the parent to recover full damages for the services of the child during his minority, such damages must be specially averred and demanded in the complaint. *Ib.*
3. *Same.—Excessive Damages.—Verdict.*—Where, in such case, the complaint did not aver and demand damages for the loss of future services of the child, and there was no evidence tending to show a loss of such services to the parent, a verdict assessing his damages at \$1,800 is excessive. *Ib.*
4. *Surface Water.—Obstruction of.—Watercourse.*—The owner of land may, upon the boundaries thereof, not interfering with any natural or prescriptive watercourse, erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands; and for any consequent repulsion, turning aside or heaping up of these waters, to the injury of other lands, he is not responsible; but such waters as fall in rain and snow upon his lands, or come thereon by surface drainage from or over contiguous lands he must keep within his boundaries, or permit them to flow off without artificial interference, unless within the limits of his land he can turn them into a natural watercourse. *C. & V. R. R. Co. v. Stevens, 278*
5. *Exemplary Damages.—Assault and Battery.—False Imprisonment.*—Exemplary damages can not be awarded where the act which constitutes the cause of action is punishable by a criminal prosecution, as for assault and battery; but such damages may be recovered in actions brought by persons injured by wrongful restraint or false imprisonment. *Farman v. Lauman, 568*

3. *Same.—Excessive Damages.—Verdict of Jury.*—Courts should not interfere with the verdict of a jury on the ground of excessive damages, unless such damages are so great as to appear outrageous, or such as to induce the belief that the award was the result of passion or prejudice and not the conclusion of deliberate judgment. *Ib.*

DECEDENTS' ESTATES.

See PRINCIPAL AND SURETY, 2; PROMISSORY NOTE, 22.

1. *Vacating Sale.—Increased Offer.*—The provision of the statute, that, in sales of real estate made by administrators and guardians, the court may vacate the sale when it appears that a sum exceeding that bid by ten per cent., exclusive of the expense of the sale, can be obtained, applies, by implication, to sales of personalty made under order of the court, and the court may, in the exercise of a sound discretion, refuse to confirm a private sale of personalty when it is shown that such an advance can be obtained. *Williams v. Perrin*, 57
2. *Same.—Confirmation.—Vested Right.*—Where, by the terms of the order authorizing such sale, the sale is to be reported to the court for confirmation, until such confirmation is had the contract of purchase does not confer a vested right on the purchaser. *Ib.*
3. *Circuit Courts.—Jurisdiction.*—Since the abolition of common pleas courts, the circuit courts have original and exclusive jurisdiction of all matters relating to the settlement and distribution of decedents' estates. *Ib.*
4. *Pleading.—Cross Complaint.—Practice.—Administrator De Son Tort.—Contract.—Promissory Note.—Judgment.*—In an action by A., as the administrator of B., against C., as administrator *de son tort*, C. filed a cross complaint, alleging a contract with B., in his lifetime, whereby B. had transferred all his property to C., and that a part of such property consisted of notes against A., which had been wrongfully taken, and were wrongfully held by A.
Held, that, although such cross complaint named A. as an individual, and not as administrator, yet it being apparent that he held such notes as administrator, such cross complaint was sufficient, if proven true, to entitle C. to a judgment and an order for the return of said notes.
Held, also, that, in such action, a personal judgment could not be properly rendered against A. on such notes. *Fessler v. Crouse*, 64
5. *Same.—Instruction.*—In such action it was erroneous to instruct the jury that, if they found something due the plaintiff on his complaint, and something due the defendant on his cross complaint, they should deduct one sum from the other, and give a verdict for the excess to the party entitled thereto. *Ib.*
6. *Administrator De Son Tort.—Complaint of Creditor.—Pleading.*—In an action by a creditor of a decedent's estate against one who, it was alleged, had wrongfully intermeddled with and converted the personal property of the decedent to his own use, the complaint must affirmatively show that the creditors of the decedent were entitled to have such property go into the hands of an administrator.
Goff v. Cook, 351
7. *Same.—Judgment.—Penalty.*—In such action, the creditor is not entitled to a personal judgment against the intermeddler, but that he shall account to the court of probate jurisdiction for the full value of the property intermeddled with, and ten per centum thereon. *Ib.*
8. *Property Fraudulently Conveyed.—Right of Creditor to Sue Heirs without Administration of Estate.*—A creditor may, in a suit to collect his debt, have a conveyance of property fraudulently conveyed by his debtor set aside, and the property subjected to the payment of his claim, without regard to the claims of other creditors. But where

the original debtor is deceased, and no administration has been had upon his estate, a single creditor suing for himself alone, can not maintain an action against the heirs, on a promise of the deceased, and to have property fraudulently conveyed subjected to the payment of his claim, but he must proceed through an executor or administrator for the collection of his debt. *Carr v. Huette*, 378

9. *Debts of Testator.—Devisee.*—The devisee of land and his grantee take it subject to the payment of the testator's debts.

Moncrief v. Moncrief, 587

10. *Same.—Executor.—Sale of Land.*—It is an executor's duty to apply to the proper court for an order for the sale of land to pay debts when necessary, and it is proper to order sale on his petition whenever it would be on the petition of creditors. *Ib.*

11. *Same.—Administrator's Consent.—Creditor's Right.—Estoppel.—Case Overruled.*—The consent of the administrator to the sale of the land by the heir can not divest the creditor of his right to have his debt made out of the land, although such consent might estop him, were the rights of creditors not affected. *Pell v. Farquar*, 3 Blackf. 331, overruled on this point. *Ib.*

DECLARATIONS.

See FRAUDULENT CONVEYANCE, 5.

DECREE.

See REAL ESTATE, ACTION TO RECOVER, 2.

DEED.

See CONTRACT, 1; CONVEYANCE; SHERIFF'S SALE, 1, 3.

DEMAND.

See JUDICIAL SALE, 6.

When Unnecessary.—Where one disputes his liability to refund the money for which he is sued, no formal demand is necessary.

Toney v. Toney, 34

DEMURRER TO EVIDENCE.

See HEADY v. BECK, 600; PRACTICE, 7.

DESCENTS.

See MARRIED WOMAN, 2; WILL, 7.

Wife's Interest in Real Estate of Husband.—Under section 27 of the act regulating descents, 1 R. S. 1876, p. 413, a surviving wife is entitled to one-third of all lands in which her husband had an equitable interest at the time of his death. *Ketchum v. Schicketanz*, 137

DESCRIPTION.

See CONTRACT, 1; CONVEYANCE; CRIMINAL LAW, 13; HIGHWAY, 9, 10; LIQUOR LAW, 4; PLEADING, 7.

DEVISEE.

See DECEDENTS' ESTATES, 9.

DILIGENCE.

See NEW TRIAL, 1, 5.

DISMISSAL.

See APPEAL; FORMER ADJUDICATION, 1; LIQUOR LAW, 5.

DITCHES AND DRAINS.

1. *Appeal from Board of Commissioners.—Statute Construed.*—The language of the proviso in section 10 of the drainage law of 1875, 1 R. S.

1876, p. 430, "Any party aggrieved may appeal," gives a general right of appeal from orders entered by a board of commissioners under authority of any section of such drainage law.

Houk v. Barthold, 21

2. *Same*.—Under section 31 of the act in relation to the organization of county boards, 1 R. S. 1876, p. 357, any one aggrieved has a right of appeal from the orders of a board of county commissioners in relation to the establishment of a ditch under the act of 1875, *supra*. *Ib.*
3. *Party*.—*Assessment*.—Where an assessment is made against land under the drainage law, *supra*, and the owner is named in such assessment, this is sufficient to make him a party to the proceedings, although not named in the petition asking an order for the construction of the ditch, and to entitle him to an appeal from such proceedings. *Ib.*
4. *Name*.—*Initials*.—*Identity*.—Objection to the identity of a person can not be raised for the first time in the Supreme Court, on account of the use of the initial letters of proper names in the assessment made by the commissioners in such proceedings. *Ib.*

DIVORCE.

See JONAS *v.* JONAS, 601; PROMISSORY NOTE, 16.

DRAINAGE.

See DAMAGES, 4.

ELECTIONS.

See SUPREME COURT, 9.

EMBEZZLEMENT.

See FALSE IMPRISONMENT, 1.

ENDORSEMENT.

See PLEADING, 12.

EQUITY OF REDEMPTION.

See CHATTEL MORTGAGE, 2.

ESTOPPEL.

See DECEDENTS' ESTATES, 11; JUDICIAL SALE, 4; PROMISSORY NOTE, 14; REPLEVIN, 3; WILL, 6.

EVIDENCE.

See CONSTABLE; FALSE IMPRISONMENT, 2, 4 to 7; FORMER ADJUDICATION, 1; FRAUDULENT CONVEYANCE, 5 to 7; HIGHWAYS, 5; INJUNCTION, 6; INSTRUCTIONS, 4, 8, 9; JUDGMENT, 8, 10; MORTGAGE, 6, 10; NEW TRIAL; PLEADING, 11, 16; PRACTICE, 7, 8, 13, 14, 17; PROMISSORY NOTE, 4, 15; SHERIFF'S SALE, 3, 4; SUPREME COURT, 5, 8, 11, 12, 14, 16, 18, 34; VARIANCE, 2; WILL, 1; WITNESS, 1, 5.

1. *Presumption*.—The testimony of an incompetent witness is presumed to have been an injury to the adverse party.

Wiseman v. Wiseman, 112

2. *Expert*.—The testimony of an expert as to the relative value of the labor necessary to produce a crop, to that which is required to prepare it for shipment and market it, in an action by plaintiff for one-half of the proceeds of such crop raised by him on defendant's lands, is immaterial and no error is committed in excluding it.

Kelly v. Northington, 152

3. *Records of City Council*.—In a suit against a city for injuries sustained by failing to keep in repair a highway or street, it is competent to put in evidence the records of the common council, to show that the street or highway is under the control of said city.

City of Huntington v. Mendenhall, 460

EXCEPTION.

See PRACTICE, 11, 14, 16, 17; SUPREME COURT, 15, 26.

EXCESSIVE DAMAGES.

See DAMAGES, 3, 6.

EXECUTION.

See BANKRUPTCY; CHATTEL MORTGAGE, 2; CONSTABLE; MARRIED WOMAN, 2; MORTGAGE, 7; PARTNERSHIP, 1; PROCEEDING SUPPLEMENTARY TO EXECUTION.

EXEMPLARY DAMAGES.

See DAMAGES, 5.

EXEMPTION.

See HIGHWAY, 7.

1. *Resident Householder*.—A judgment debtor, after the death of his wife, employed a family to keep house for him and his adopted daughter, who was dependent on him for support. During the daughter's visit to her natural mother, an execution was levied upon his property which he claimed as exempt therefrom.

Held, that he was a resident householder and entitled to exemption.

Bunnell v. Hay, 452

2. *Same.—Householder*.—A householder is one upon whom rests the duty of supporting the members of his family or household. *Ib.*

EXHIBIT.

See PLEADING, 10, 15, 18, 23; PRACTICE, 19; SUPREME COURT, 16.

EXPERT.

See EVIDENCE, 2.

EXPRESS COMPANY.

See FALSE IMPRISONMENT, 1, 2.

EXTENSION OF TIME.

See PRINCIPAL AND SURETY, 3.

FAILURE OF CONSIDERATION.

See PROMISSORY NOTE, 5.

FALSE IMPRISONMENT.

See DAMAGES, 5.

1. *Corporation.—Express Company.—Power to Cause Arrest by Agent.—Liability for Acts of*.—An express company has the power, by proper and lawful modes, to pursue and cause the arrest and punishment of any one who has stolen or embezzled the money or property of the company, or for which it was responsible, and may employ an agent for such purpose; but for any trespass committed by him in the prosecution of such employment such company is liable.
American Express Co. v. Patterson, 430
2. *Pleading.—Complaint.—Demurrer.—Practice.—Evidence*.—In an action against an express company and others, to recover damages for arrest and imprisonment, an allegation in the complaint that the injury was caused "at the instigation and procurement" of such company, is sufficient on demurrer, and, without a motion to make specific, evidence is admissible tending to show the truth thereof. *Ib.*
3. *Same.—Liability of Tortfeasors.—Judgment.—Contribution.—Verdict.—Venire de Novo.—Practice.—Trespass*.—The liability of tortfeasors is not joint, but several. An action may be had against all or any number of them, and separate actions may be prosecuted at the same time

against them therefor, and separate verdicts and judgments obtained, whether for the same or different amounts, though the plaintiff can have but one satisfaction; but, whether the judgment be joint or several, there is no right of contribution which can be enforced as between the defendants, and, where the action is against all, the fact that the verdict is silent as to one is no cause for a *venire de novo*. *Ib.*

4. *Same.—Evidence.—Special Constable.—Warrant.—Malicious Prosecution.*—In an action for false imprisonment, evidence of the proceedings before the justice, after the arrest of the plaintiff by a special constable on a warrant directed to any constable of the county, is admissible. Such arrest is illegal, and evidence thereof tended to show false imprisonment only, and not a malicious prosecution. *Ib.*
5. *Same.—Habeas Corpus.—Evidence.*—In such action evidence of the proceedings on a writ of *habeas corpus*, by which the plaintiff was discharged from custody, is competent and pertinent. *Ib.*
6. *Same.—Evidence of Character of Plaintiff.—Mitigation of Damages.*—Where, in such action, the defendants plead, in mitigation of damages, that they acted in good faith in causing the arrest, and adduce evidence thereunder tending to cast suspicion on the plaintiff's character, evidence of his general good character, and of his reputation for honesty and integrity, is admissible to rebut the claim of such good faith and belief of his guilt, on the part of the defendants, though not admissible in the first instance, as in cases of malicious prosecution. *Ib.*
7. *Same.—Special Damage.—Loss of Employment.—Hearsay Evidence.*—Proper evidence by the plaintiff in such a case, of the loss of a situation by reason of the arrest, is admissible; but evidence of the statements of another to that effect is mere hearsay, and inadmissible as evidence of the fact. *Ib.*

FALSE PRETENCES.

See CRIMINAL LAW, 6.

FALSE REPRESENTATION.

See PLEADING, 14.

FEE BILL.

See JUDGMENT, 9.

FEE BOOK.

See JUDGMENT, 8.

FEES AND SALARIES.

See JUDGMENT, 9.

FINDING.

See ATTORNEY, 6, 7; FORMER ADJUDICATION, 1.

FINE.

See LIQUOR LAW, 1.

FORECLOSURE.

See CHATTEL MORTGAGE; JUDGMENT, 1 to 3; MECHANIC'S LIEN; MORTGAGE; REAL ESTATE, ACTION TO RECOVER; SHERIFF'S SALE, 3.

FORGERY.

See CRIMINAL LAW, 12; PROMISSORY NOTE, 10, 21.

FORMER ADJUDICATION.

See GUARDIAN AND WARD, 2.

1. *Lis Pendens*.—*Announcement of Finding*.—*Judgment of Dismissal*.—*Evidence*.—*Appeal*.—*Judgment, Effect of Reversal of*.—*Collateral Attack*.—*Promissory Note*.—In an action on a promissory note, record evidence was introduced which showed that a previous suit had been instituted, on the same note, by the plaintiff against the defendants, the makers, M. and W., wherein M. made default and W. made defence, and that the issue formed therein was submitted to the court for trial, and that, after hearing the evidence, the court took the cause under advisement; that, on the next day, the plaintiff, by leave of court, dismissed such action, without prejudice, and thereupon judgment was rendered against the plaintiff for costs, from which W. had appealed to the Supreme Court.
Held, that such record did not establish the pendency of a previous action on the same note, but showed a final judgment, which was in full force at the time of the trial.
Held, also, that the only effect of such appeal was to stay execution on the judgment, and that, in other respects, the judgment was binding upon the parties to it during the pendency of the appeal.
Held, also, that such record evidence did not show a former adjudication of the subject-matter of the subsequent action.
Held, also, that it was the duty of the court to construe such record evidence, and that it was not error for the court to instruct the jury that such evidence was not sufficient to prove either a former adjudication or the pendency of a previous action on such note.
Held, also, that such judgment of dismissal, though made after an announcement, by the court, of its finding, could not be collaterally attacked, and that the fact that it may have been since reversed, does not divest it of the obligatory character it had at the time it was offered in evidence. *Walker v. Heller*, 46
2. *Same*.—*Stay of Proceeding*.—*Restraining Order*.—*Verdict*.—If, in such action, W. had, before answering or going into trial, made a proper application for a stay of proceedings until the appeal in the former action had been determined, he would have been entitled thereto; but, after verdict against him, such application was unavailable. *Ib.*

FRAUD.

See FRAUDULENT CONVEYANCE; PLEADING, 14; PROMISSORY NOTE, 2, 20.

FRAUDULENT CONVEYANCE.

See DECEDENTS' ESTATES, 8.

1. *Volunteer*.—A voluntary conveyance, made by a debtor who has no other property subject to execution, except that conveyed, is fraudulent as to creditors. *Spaulding v. Blythe*, 93
2. *Same*.—*Pleading*.—*Complaint*.—*Notice*.—*Consideration*.—*Case Distinguished*.—In a complaint to set aside a fraudulent conveyance, made without consideration, it is not necessary to allege that the grantee had notice of the fraudulent purpose of the grantor. *Spaulding v. Myers*, 60 Ind. 264, distinguished. *Ib.*
3. *Same*.—In such case, even though the conveyance was without consideration, the complaint must allege that, at the time, the grantor did not have sufficient other property, subject to execution, to satisfy the claims of creditors. *Ib.*
4. *Complaint*.—*Value of Property*.—A complaint to set aside a fraudulent conveyance of real estate is not insufficient for failure to aver the value of such real estate, but such complaint must show that the defendants had no property subject to execution at the time the action was commenced. *Sherman v. Hogland*, 472
5. *Same*.—*Evidence*.—*Husband and Wife*.—*Conspiracy to Defraud Creditors*.—*Declarations of Husband*.—Where a husband and wife act in

concert to defraud the creditors of the husband, the declarations of the latter, made before the common purpose was accomplished, are admissible in evidence against both. *Ib.*

6. *Same.—Statements of Wife to Assessor as to Her Property.*—In such case the sworn statements of the wife to the assessor, as to her separate property, are properly admissible in evidence, as showing her ability or inability to pay for the real estate conveyed to her. *Ib.*
7. *Same.*—In such case, the existence of a confidential relationship between the grantor and grantee, and the pendency of an action against the former, are proper circumstances for the jury to consider as indications of fraud. *Ib.*
8. *Same.—Consideration.—Notice.*—The rule, that where the grantee has paid a valuable consideration for the conveyance, it can not be adjudged fraudulent, unless the grantee had notice of the fraudulent intent of the grantor, does not apply to cases where no consideration was paid. *Ib.*
9. *Same.—Instruction.—Outstanding Title.*—An instruction in such case, that the lands claimed by the husband could not be subjected to the payment of his debts, where the wife had purchased an outstanding title, whether it was paramount or not, was rightly refused. *Ib.*
10. *Same.*—Under section 456 of the code, property fraudulently conveyed by a debtor may be sold without appraisement. *Ib.*

GRAND JURY.

See CRIMINAL LAW, 11.

GROWING CROP.

See RECEIVER.

GROWING TREES.

See STATUTE OF FRAUDS, 5.

GUARANTY.

1. *Assignor.—Contract.*—A verbal guaranty that a note is genuine and its maker liable to pay it, made by the assignor to the assignee at the time of its assignment and delivery, based upon a sufficient consideration, is a binding and valid obligation. *King v. Summitt, 312*
2. *Same.—Statute of Frauds.*—A guaranty, that a third person is liable upon a note executed by him, is not a promise to answer for the debt of another, but an assurance of the existence of certain things. *Ib.*
3. *Same.—Minor.—Pleading.*—If a guaranty contains a promise to pay the debt of A., the averment that A. was a minor when he contracted said debt will take the case out of the statute of frauds. *Ib.*

GUARDIAN AND WARD.

See PRINCIPAL AND SURETY, 2.

1. *Final Settlement.—Limitation.*—The same limitation applies to the time in which an action may be commenced to set aside the final settlement of a guardian, as to actions to set aside the final settlement of an executor or administrator. *Briscoe v. Johnson, 573*
2. *Same.—Former Adjudication.*—So long as the final settlement of a guardian remains in force, it is an adjudication of the matters lawfully embraced within it. *Ib.*

HABEAS CORPUS.

See FALSE IMPRISONMENT, 5.

HARMLESS ERROR.

See EVIDENCE, 2; NEW TRIAL, 3; PLEADING, 20; PRACTICE, 9, 18; VARIANCE, 1.

HEARSAY EVIDENCE.

See FALSE IMPRISONMENT, 7.

HIGHWAY.

See CITIES AND TOWNS, 6; JURISDICTION, 2; NUISANCE, 1, 2, 3.

1. *Opening of.—Statute Construed.—Collateral Attack.*—Under section 15 of the statute providing for the opening of highways, 1 R. S. 1876, p. 531, the petition therefor is sufficient, against collateral attack, if it appears that either an owner, or an occupant, or an agent of the land through which the highway is to pass, was properly named therein. *Porter v. Stout, 3*
2. *Notice of Filing Petition.—To whom Given.—Constitutional Law.*—The Legislature has the power to prescribe what shall be a reasonable notice of the pendency of a petition for the opening of a highway, and whether it may be given to the owner or to the occupant of land affected thereby; and under section 15, *supra*, notice is sufficient if given to either the owner or occupant. *Ib.*
3. *Notice to Remove Fences.—Sufficiency of.*—Under section 41 of the statute, *supra*, notice by the supervisor to remove fences on land through which a highway has been located, is sufficient if given to either the owner or occupant. *Ib.*
4. *Admissions of Occupant of Land.—Principal and Agent.*—Where an occupant of land has been made a party to the proceedings for the opening of a highway through such land, his admissions as to matters connected therewith are those of a principal, and not of an agent. *Ib.*
5. *Husband and Wife.—Notice to Husband.—Evidence.*—In a proceeding to open a highway through lands occupied by a husband and wife, though owned by the wife, it is sufficient to name the husband as the occupant thereof, in the petition and notices, and his admissions in relation thereto are admissible in evidence. *Ib.*
6. *Exemption from Labor.—Township Trustee.*—Exemption from labor on highways, under section 9, 1 R. S. 1876, p. 857, is to be determined exclusively by the township trustee, and the ground merely, on which he might exempt a person from road work, is insufficient to constitute a defence to an action for failure to perform such work. *Winfield Township v. Wise, 71*
7. *Same.—Road Labor.—Commutation.—Jury.—Exemption.*—The amount of exemption allowed in cases of judgments founded on contracts can not be considered by the jury in such action, in determining whether the defendant was too poor to pay the commutation for such labor. *Ib.*
8. *Street.—Sidewalk.*—A public street is a public highway, and a sidewalk is a part of the street, and public highways belong, from side to side and from end to end, to the public. *State v. Berdella, 185*
9. *Petition.—Description.*—A petition to locate a highway must describe the highway with sufficient certainty to enable a practical surveyor to run it, and, therefore, the description in such a petition, "thence north-west fourteen rods, with an angle of about ten degrees," is void. *Smith v. Weldon, 454*
10. *Uncertainty in Description.*—The description of a highway embraces its beginning, course and termination. If in any of these particulars it is so uncertain that a practical surveyor can not locate it, the entire road fails; and any person through whose land the road will pass may show such defect, whether it occurs in that part of the road on his land or not. *Ib.*

11. *Injunction.—When Granted.*—An injunction will not be granted unless the plaintiff shows that the threatened injury would be irreparable, or would produce great injury to him, and that he is equitably entitled thereto, and has no adequate remedy at law. *Ib.*
12. *Pleading.—Complaint.*—In an action to enjoin the opening of a highway, a transcript of the proceedings before the county board locating the same, filed with the complaint, constitutes no part thereof. *Ib.*

HOUSEHOLDER.

See EXEMPTION LAW.

HUSBAND AND WIFE.

See DESCENTS; FRAUDULENT CONVEYANCE, 5 to 7; HIGHWAY, 5; JUDICIAL SALE; MECHANIC'S LIEN, 6; WILL, 7; WITNESS, 4.

1. *Interest of Surviving Wife in Real Estate of Husband.*—Under the statute of this State, a surviving wife, who has not conveyed or relinquished her interest in the property of her husband, accepted a jointure, or received a valid antenuptial settlement, can not be deprived of her rights in the lands of her deceased husband, unless, at the time of his death, she was living apart from him in adultery. *Wiseman v. Wiseman, 112*
2. *Marriage.*—Nothing but death, or a judicial decree, can dissolve the marriage tie. *Ib.*
3. *Partition.—Widow Incompetent Witness.*—Under the act of March 11th, 1867, 2 R. S. 1876, p. 132, a surviving wife is not a competent witness, in her own behalf, in an action for the partition of the lands of her deceased husband, against the other heirs or devisees, as to matters which occurred prior to the death of her husband. *Ib.*
4. *Injury to Wife.—Witness.—Damages.*—Under section 1 of the act of March 11th, 1867, 2 R. S. 1876, p. 132, a wife is a competent witness in an action by her and her husband to recover damages for a personal injury to herself. *Farman v. Lauman, 568*

HYPOTHETICAL CASE.

See CRIMINAL LAW, 9.

IDENTITY.

See DITCHES AND DRAINS, 4; SLANDER, 2.

IMPEACHMENT.

See WITNESS, 1, 5.

INDEMNITY BOND.

See BOND, 4.

INDICTMENT.

See CITIES AND TOWNS, 8; CRIMINAL LAW, 6, 10 to 13; LIQUOR LAW, 6.

INFORMATION.

See CRIMINAL LAW, 1, 2, 3; LIQUOR LAW, 6.

INJUNCTION.

See CITIES AND TOWNS, 8; FORMER ADJUDICATION, 2; HIGHWAY, 11, 12; LIFE-ESTATE, 1, 3; MORTGAGE, 7.

1. *Damages.*—It is not every injury which will support an action for damages, that will entitle the complainant to relief by injunction. *Owen v. Phillips, 284*
2. *Nuisance.*—A lawful business may be so conducted as to become a nuisance, but, in order to warrant interference by injunction, the injury must be material and essential. *Ib.*

3. *Facts Necessary to Warrant.*—In an action by an adjoining property owner, to enjoin the running of a flouring mill, he must show that the acts complained of cause him substantial and essential injury, and that a serious wrong is done him thereby. There must be the wrongful invasion of a legal right, and the damage resulting must be serious and substantial. Minor inconveniences must be remedied by action for damages, and not by injunction. *Ib.*
4. *Injury to Property.--Enjoyment of.*—In such action it is not necessary for the plaintiff to prove both an injury to the property itself and an interference with its enjoyment. As a general rule, a lawful business will not be enjoined merely because it diminishes the value of adjacent property. *Ib.*
5. *Civil Action.*—Actions for injunctions are ordinary civil actions, and the rules of evidence therein are not different from those which obtain in civil actions. *Ib.*
6. *Facts Necessary to Authorize Injunction Against Private Nuisance.--Evidence.--Instruction.* In an application for an injunction against maintaining a private nuisance, the facts relied upon ought to be so weighty, so material and so serious and important in character as to leave no doubt that they create an actionable nuisance. Yet the court ought not to use any expression in its charge to the jury in such case that will induce the belief that the facts constituting the complainant's cause of action must be proved beyond a doubt. *Ib.*
7. *Location of Nuisance.*—Whether a thing is or is not a nuisance, does not depend upon the notions of persons living in the particular locality; although a business, in some localities, will be considered a nuisance, which, in another, would not be so considered. *Ib.*
8. *Mills.--Manufactories.--Rights of Adjoining Property Owners.*—While courts interfere, by injunction, against establishments such as mills and manufactories, with great caution, and only in cases where the facts are weighty and important, and the injury complained of is serious and permanent in character, yet, wherever a mill or factory may be located, whatever its surroundings, property owners of the vicinity have a right to require that it shall be properly managed, conducted with ordinary care and a proper regard for the rights of others, and so that no unnecessary inconvenience or annoyance shall be caused to them. *Ib.*

INJUNCTION BOND.

See PLEADING, 10.

INJURY TO EMPLOYEE BY CO-EMPLOYEE.

See NEGLIGENCE, 6; PLEADING, 16.

INSOLVENCY.

See PROMISSORY NOTE, 11.

INSTRUCTIONS.

See CITIES AND TOWNS, 14; CRIMINAL LAW, 4, 5, 9; DECEDENTS' ESTATES, 5; FRAUDULENT CONVEYANCE, 9; INJUNCTION, 6; PARTNERSHIP, 3; PRACTICE, 12; SUPREME COURT, 21; WITNESS, 2.

1. *Equivalent of "Material Allegations."*—An instruction, that the plaintiff was entitled to recover, "unless the defendant has proved, * * * in substance, the allegations in one or more paragraphs of his answer," is fairly equivalent to saying that, to constitute a defence, it was only necessary to prove the *material* allegations in some one of the paragraphs of answer, and was, therefore, sufficient. *Walker v. Heller, 46*
2. *Partial Instruction Supplemented by Another.*—Where an instruction

given states the law correctly as far as it goes, but stops short of the full statement of the law applicable to the particular question involved, and such instruction is supplemented by another covering the point omitted, no error is committed. *Ib.*

3. *Practice.—Record.—Supreme Court.*—Instructions given by the court of its own motion must be signed by the judge or embodied in a bill of exceptions, to form a part of the record on appeal to the Supreme Court. *Dennerline v. Gable, 210*
4. *Evidence.—Presumption.*—Where an instruction asserts a correct proposition of law, the Supreme Court, in the absence of the evidence, will presume such instruction to have been properly given. *Ib.*
5. *Practice.—Modified Instruction.—Record.—Bill of Exceptions.*—Where the words modifying an instruction are excepted to, but the exception is neither signed nor authenticated by court or counsel, the modification is not properly made a part of the record, on appeal to the Supreme Court without a bill of exceptions. *Helms v. Wayne Agricultural Co., 325*
6. *Practice.—Bill of Exceptions.*—Instructions given by the court, of its own motion, do not constitute a part of the record, unless signed by the judge, or made part of the record by bill of exceptions. *City of Lafayette v. Larson, 367*
7. *Same.*—Where instructions to a jury are not numbered or divided into distinct propositions, an exception to any part of them can be reserved by excepting to all collectively. *Ib.*
8. It is not error for the court to refuse instructions which are correct as abstract propositions of law, but irrelevant to the case made by the evidence; nor is it error to refuse instructions where the court has fully covered the points in its own instructions. *Sherman v. Hogland, 472*
9. *Practice.—Evidence.*—Where an instruction gave the law correctly in the abstract, a judgment will not be reversed because of its inapplicability to the evidence, unless such inapplicability was presumably injurious to the party complaining. *Stockton v. Stockton, 510*

INTEREST.

See JUDGMENT, 6; PROMISSORY NOTE, 7.

INTERLOCUTORY ORDER.

See RECEIVER, 3.

INTERROGATORIES.

See PRACTICE, 5, 9, 11, 12; STATUTE OF FRAUDS, 3.

JOINT NOTE.

See PROMISSORY NOTE, 22.

JUDGMENT.

- See ARBITRATION AND AWARD; BANKRUPTCY; CHATTEL MORTGAGE, 3; DECEDENTS' ESTATES, 4, 7; FALSE IMPRISONMENT, 3; FORMER ADJUDICATION; MARRIED WOMAN, 1; PARTITION, 1; PLEADING, 15; PRACTICE, 3; SUMMONS, 1, 4, 5; SUPREME COURT, 14, 15, 29.
1. *Revival of Judgment.—Foreclosure of Mortgage.—Limitation.*—A decree of foreclosure is not an ordinary judgment within the meaning of section 527 of the code, and an action to revive such judgment or decree will lie at any time within twenty years from the date thereof. *Evansville Gas-Light Co. v. State, 219*
 2. *Lien of.—Statute Construed.*—Under the provisions of sections 528 and 529, 2 R. S. 1876, p. 234, the transcript of a judgment, filed in a

county other than that where rendered, does not create a lien on real estate in such county against subsequent purchasers thereof in good faith, without notice, unless recorded and entered in the judgment docket of the court of such county. *Berry v. Reed, 235*

3. *Foreclosure of Mortgage.—Divisibility of Premises.—Erroneous Judgment.—Correction of, on Motion at Subsequent Term.—Appeal.—*Where, in a suit to foreclose a mortgage, the court rendered judgment showing that there were instalments of the mortgage debt yet to become due, but failed to find whether or not the mortgaged property was susceptible of division, the court could correct such omission, on motion, at a subsequent term. But the court could not, upon such motion, review its former finding and judgment as to any question of fact decided. Relief from such error could only be had by appeal. *Hannah v. Dorrell, 465*
4. *New Trial.—*After the term at which a judgment is rendered, a new trial can be had only on complaint, and for causes discovered after the term, *Ib.*
5. *Action on.—*A judgment is a debt of record, and an action may be maintained thereon for the recovery of such debt, although the judgment plaintiff therein could enforce its collection by execution issued out of the court in which it was rendered. *Palmer v. Glover, 529*
6. *Same.—Costs.—Interest.—*A judgment for costs is a judgment for money," within the meaning of the act of March 10th, 1879, concerning interest, etc., Acts 1879, p. 43, and bears interest from the date of the return of the verdict or finding of the court, until the same shall be satisfied, and a judgment plaintiff is entitled to recover for such costs, with interest thereon, in an action upon his judgment. *Ib.*
7. *Same.—Entry of Costs in Order Book.—*It is not necessary that the entry of a judgment on the order book should specify the amount of the costs recovered. *Ib.*
8. *Same.—Fee Book.—Record.—Evidence.—*The fee book of the clerk of the circuit court is a public record, and judgment defendants are bound by the lawful entries of such clerk against them therein, and it is competent evidence of the amount of costs due the judgment plaintiff in an action on his judgment. *Ib.*
9. *Same.—Fee Bill.—Fees and Salaries.—*The provisions of section 39 of the fee and salary act of March 12th, 1875, in relation to actions on fee bills, 1 R. S. 1876, p. 478, are not applicable to a suit upon a judgment, and for the costs recovered therein. *Query*, whether the fee and salary act of March 31st, 1879, Acts 1879, p. 130, does not repeal section 39, *supra*. *Ib.*
10. *Same.—Collateral Attack.—Parol Evidence.—Taxation of Costs.—*If the costs, or any of the items thereof, were illegal charges against the judgment defendant, he might have had a taxation of the costs, by a motion for that purpose, in the original cause, but could not, in an action on the judgment therein, impeach the judgment for costs by parol evidence. *Ib.*

JUDGMENT NON OBSTANTE.

See PRACTICE, 5.

JUDICIAL KNOWLEDGE.

See CIRCUIT COURTS, 2; SUPREME COURT, 9.

JUDICIAL SALE.

See DECEDENTS' ESTATES, 1; PROMISSORY NOTES, 9.

1. *Sale of Real Estate.—Inchoate Interest of Wife.—*By the act of March 11th, 1875, 1 R. S. 1876, p. 554, the inchoate interest of a wife in the lands of her husband vests absolutely in her when such lands are

- sold and conveyed away from him under a judicial proceeding, in the same manner and to the same extent as such interest would vest in her upon the death of her husband. *Ketchum v. Schicketanz*, 137
- 2. *Same. — Bankruptcy. — Conveyance to Assignee. — Inchoate Interest of Wife in Bankrupt's Real Estate.*—A conveyance by a register in bankruptcy of the real estate of an adjudged bankrupt to his assignee is a judicial sale within the meaning of said act of 1875, and vests the inchoate interest of the bankrupt's wife in such real estate, in the same manner and to the same extent as upon a judicial sale made in pursuance of the laws of this State. *Ib.*
- 3. *Same. — Sheriff's Certificate. — Fraudulent Assignment. — Conveyance. — Commissioner.*—Where, in proceedings in bankruptcy, an assignment by the bankrupt of a sheriff's certificate of purchase of real estate, after the time for its redemption had expired, under which the assignee thereof had obtained a deed, is adjudged fraudulent and set aside, and the real estate included therein conveyed to the assignee of the bankrupt by a commissioner, in pursuance of an order of court, such conveyance is a judicial sale within the meaning of said act of March 11th, 1875, and placed such real estate in the hands of such assignee, in the same condition with reference to the claim of the wife of such bankrupt therein, as if it had been conveyed to such assignee by the judge or register in bankruptcy in the usual way after the adjudication in bankruptcy. *Ib.*
- 4. *Same. — Partition. — Estoppel.*—In an action for partition of such real estate against the purchaser thereof at the bankrupt sale, such purchaser is estopped from asserting that the bankrupt had no title to the real estate at the time he was adjudged a bankrupt. • *Ib.*
- 5. *Conveyance to Assignee of Real Estate of Bankrupt. — Wife's Interest.* — The conveyance of an adjudged bankrupt's real estate by the register to the assignee in bankruptcy is a "judicial sale," within the meaning of the act of March 11th, 1875, 1 R. S. 1876, p. 554, and the inchoate interest of the wife of the bankrupt becomes vested as soon as such conveyance is made. *McCracken v. Kuhn*, 149
- 6. *Same. — Partition by Wife. — Demand.*—Under such act the wife may maintain an action for partition without first making a demand therefor of the purchaser of the lands at a judicial sale. *Ib.*

JURISDICTION.

See CITIES AND TOWNS, 4; CIRCUIT COURTS, 1, 2; DECEDENTS' ESTATES, 3; SPECIFIC PERFORMANCE, 3; WAIVER; WILL, 4.

- 1. *Collateral Attack.*—Where the jurisdiction of an inferior court depends upon a fact which such court is required to ascertain and settle by its decision, such decision is conclusive as against all collateral attacks. *Porter v. Stout*, 3
- 2. *Highway. — Petition. — Names of Owners of Land Affected. — County Commissioners.*—The sufficiency of a petition for the location of a highway, as to the proper designation of the names of the owners or occupants of the lands to be affected thereby, is a jurisdictional fact to be determined by the board of commissioners, and its judgment thereon can not be collaterally attacked. *Ib.*
- 3. *Presumption.*—Where a court of general jurisdiction exercises jurisdiction, it will be presumed that it rightfully assumed and exercised such authority, unless the record affirmatively shows want of jurisdiction. *Houk v. Barthold*, 21
- 4. *Record. — Supreme Court. — Practice.*—Where a court has jurisdiction of the subject-matter, the record, on appeal to the Supreme Court, must not only affirmatively show the error complained of in the method

of getting the particular cause in court, but must also show that the irregularity complained of was brought to the attention of the trial court. *Ib.*

JUROR.

See SUPREME COURT, 6.

1. *Competency of, how Determined.—Discretion.*—Although a juror, who has expressed an opinion as to the guilt or innocence of the accused, is incompetent, yet he may be competent, if he can give an unbiased hearing and verdict according to the law and the evidence adduced; and it is left to the sound discretion of the trial court to say whether, for such cause, the juror is disqualified. *Elliott v. State, 10*
2. A juror's opinion as to the morality of a particular transaction can not be considered in determining his competency to try one accused thereof. *Ib.*
3. *Opinion Concerning Collateral Question.—Supreme Court.*—How far enquiry shall be made of a juror concerning his opinion of the morality of any pursuit or business of the accused, and for what opinions in respect thereto he shall be set aside, are matters in the discretion of the trial court, and its decision will not be overruled by the Supreme Court unless it is shown that there has been an abuse of that discretion. *Ib.*

JURY.

See CRIMINAL LAW, 11; DAMAGE, 6; HIGHWAY, 7; LIQUOR LAW, 1; NEGLIGENCE, 7, 11; PRACTICE, 12, 15, 17; WITNESS, 2, 3.

JURY TRIAL.

See ATTORNEY, 5.

LEGAL DISABILITY.

Presumption.—When disability is not alleged it will be presumed not to exist. *Briscoe v. Johnson, 573*

LEGATEE.

See WILL, 2, 3, 5.

LIBEL.

See SLANDER.

LICENSE.

See LIQUOR LAW, 1, 3, 4, 6; STATUTE OF FRAUDS, 5.

LIEN.

See CHATTEL MORTGAGE, 2; JUDGMENT, 2; MECHANICS' LIEN; NEGLIGENCE, 1; NOTICE OF SALE, 1; PARTITION, 1; PLEADING, 3, 4; VENDORS' LIEN.

LIEN-HOLDERS.

See PARTITION, 5.

LIFE-ESTATE.

1. *Waste, What Constitutes.—Injunction.*—The owner in fee of real estate may enjoin a tenant for life from cutting and removing valuable growing timber, to the irreparable injury of the fee simple estate. *Robertson v. Meadors, 43*
2. *Life-Tenant's Rights.*—The extent of a life-tenant's rights, in the use of his estate, is not measured by his necessities. *Ib.*
3. *Pleading.—Complaint.—Demurrer.—Injunction.*—A complaint, by the owner of the fee of real estate, for damages and to enjoin the commission of waste by a life-tenant, which alleges the cutting and removal, and threats to cut and remove, valuable growing timber, to the irreparable injury of the fee simple estate, is sufficient on demurrer. *Ib.*

LIQUOR LAW.

1. *License.—Verdict.—Fine.—Discretion of Jury.—Supreme Court.*—The amount of a fine for selling liquor without license is, not exceeding the statutory limit, within the discretion of the jury, and the Supreme Court will not disturb a verdict on account of its amount.
Elliott v. State, 10
2. *Competency of Juror.—Belief.—Prejudice.—Cases Distinguished.*—Where, on empanelling a jury to try a person indicted for violating the liquor law, a juror, on examination as to his competency, states that he has a prejudice against the sale of intoxicating liquors, and believes such business, though legitimate, immoral and improper, but thinks he can waive his prejudice so as to do the accused justice, and try him as freely as he would a person for the violation of any other law, he is not thereby disqualified to sit as a juror on such trial. *Kelser v. Lines, 57 Ind. 431, and Swigart v. The State, 67 Ind. 287, distinguished. WORDEN, J., dissents. Ib.*
3. *License.—Applicant.—Residence.—Statute Construed.*—Under section 3 of the act to regulate the sale of intoxicating liquor, 1 R. S. 1876, p. 869, it is not necessary that an applicant for license should be a resident of the ward, town, township or county in which the place where the liquor is to be sold is situated. *Murphy v. Board, etc., 483*
4. *Same.—Description of Premises.*—In an application for license to sell liquor, under section 3, *supra*, a description so reasonably full and certain, of the premises where it is proposed to sell, as to point out the exact location thereof, is sufficient. *Ib.*
5. *Same.—Parties.—Board of Commissioners.*—In such cases, the board of commissioners is not a proper party, on appeal to the circuit court, but where the board voluntarily appeared in that court, and contested such application, it will not be heard to move for a dismissal of the appeal, in the Supreme Court, on that ground. *Ib.*
6. *Sales Without License.—Quantity Sold.—Statute Construed.—Pleading.—Indictment.—Information.—Case Overruled.*—Section 12 of the act of March 17th, 1875, to license the sale of intoxicating liquor, 1 R. S. 1876, p. 869, creates two distinct offences as to retailing without a license: selling less than a quart at a time, without reference to the place where it is to be drunk; and selling in any quantity to be drunk or suffered to be drunk on the premises where sold. And, in a prosecution under the first branch of such section, the indictment or affidavit and information must aver that the quantity sold was less than a quart, unless it is averred that it was sold to be drunk on the premises, but in a prosecution under the second branch the quantity sold is immaterial. *The State v. Zeitler, 63 Ind. 441, overruled, so far as it is in conflict with this decision. State v. Corll, 535*

LIS PENDENS.

See FORMER ADJUDICATION.

LIVERYMAN'S LIEN.

See NOTICE OF SALE.

LOST INSTRUMENT.

See CRIMINAL LAW, 12.

MALICIOUS PROSECUTION.

See FALSE IMPRISONMENT, 4.

MANUFACTORIES.

See INJUNCTION, 8.

MARION SUPERIOR COURT.

Assignment of Errors.—Practice.—Supreme Court.—Unless error is assigned on the action of the Marion Superior Court at general term, no question is presented to the Supreme Court on appeal.

Kirland v. Stumph, 514.

MARRIAGE.

See BASTARDY, 1; HUSBAND AND WIFE, 2.

MARRIED WOMAN.

See HUSBAND AND WIFE.

1. *Contract Before Marriage.—Separate Property.—Personal Judgment.—Statute Construed.*—Section 3, 1 R. S. 1876, p. 550, provides for and authorizes a personal judgment against a married woman upon her contract made before marriage, to be levied of her property only, then owned or thereafter acquired by her. *Smith v. Beard, 159*
2. *Subsequent Coverture.—Real Estate by Virtue of Previous Marriage.—Descent.—Execution.*—Where real estate has descended to a woman by virtue of a previous marriage, and such woman subsequently marries again, such real estate can not, under section 18 of the law of descents, be levied upon and sold on execution against her during her subsequent coverture. *Ib.*
3. *Contract.—Specific Performance.—Real Estate.*—Prior to the act of March 25th, 1879, concerning married women, Acts 1879, p. 160, a married woman could not bind herself in any way by an executory contract for the sale of real estate, and a specific performance thereof can not be enforced against her heirs. *Miller v. Albertson, 343*

MEASURE OF DAMAGES.

See DAMAGES; NEGLIGENCE, 3.

MECHANIC'S LIEN.

1. *Material-Man.—Pleading.—Ownership of Real Estate.*—In an action to enforce a mechanic's lien for materials used in the construction of a building, furnished by a material man to a contractor, and not to the owner, the complaint must aver that the defendant was the owner of, or asserting some interest in, the real estate against which the lien is sought to be enforced, and must show that such materials were furnished specially for such building. *Lawton v. Case, 60*
2. *Same.—Notice. Time of Filing.—Complaint.*—A complaint by a material-man, to enforce such lien, must show that the notice thereof was filed within sixty days from the time the materials were furnished. The allegation, that such notice was filed within sixty days after the completion of the building, is insufficient. *Ib.*
3. *Same.—Practice.—Personal Liability.—Defects in Lien, how Reached.—Motion to Strike Out.—Demurrer.*—Where there is a personal liability shown against the defendant, the lien being auxiliary to such liability, the validity of the lien may be tested by a motion to strike out so much of the complaint as refers thereto; but, where there is no personal liability shown, the right of action depending solely upon the validity of the lien, the sufficiency of the complaint may be tested by a demurrer thereto. *Ib.*
4. *Same.—Personal Judgment.*—No personal judgment can be taken upon the foreclosure of a mechanic's lien, where the owner is sued by a sub-contractor, unless he has properly served upon such owner the notice required in section 649, 2 R. S. 1876, p. 267. *Ib.*
5. *Same.—Allegations of Complaint.—Sub-Contractor.—Notice.*—A complaint by a sub-contractor to enforce a mechanic's lien, and seeking a personal judgment against the owner of the building, for a debt

created by the contractor, must show ownership, the service of the notice provided for in section 649, *supra*, and that, when served, the owner was indebted to the contractor. *Ib.*

8. *Implied Trust.*—Suit by A., a material man, against B. and wife and D., the purchaser of the property, and the contractor, to foreclose a mechanic's lien for materials furnished the contractor in building a house on the real estate of B.'s wife. Among other things, it was found specially that a loan had been negotiated by B. of C., with which to build, and that a certain portion thereof remained in C.'s hands, and that the certificate for the same had been assigned to D., C. retaining the amount until the building for which the loan was negotiated was completed and discharged of all mechanic's liens thereon.

Held, that, D. not having agreed to hold said certificate in trust, neither he nor his assignor is liable for the value thereof, and that no trust was created by implication of law in favor of A. upon the money in C.'s hands. *Hadley v. Hill, 442*

MERGER.

See CHATTEL MORTGAGE, 3; MORTGAGE, 3.

MILLS.

See INJUNCTION, 3, 8.

MINING LEASE.

Contract.—Construction of.—Where, in a lease for mining coal, the lessees agreed to sink a shaft upon the demised land and to mine coal within one year from the date of said lease, or, in default thereof, to pay the lessor the sum of one hundred dollars per month until such shaft should be put into operation; and further, that they would mine sufficient coal, that the royalty thereon, at twenty-five cents per ton, should amount to the sum of twelve hundred dollars, and in default thereof they agreed to pay said sum, without having so mined, payable in monthly instalments; and it was agreed that all payments of one hundred dollars were to apply on the payments of rent or royalty.

Held, that the first covenant of the lease bound the lessees to sink a shaft, and to mine coal within one year, and, if they made default, they were bound to pay the lessor, in the nature of a penalty, one hundred dollars per month.

Held, also, that, under the second covenant, the lessees were bound to pay one hundred dollars per month, in any event, after they had sunk the shaft and were mining coal, and to pay a royalty of twenty-five cents per ton, but that if the royalty should amount, in the aggregate, to more than twelve hundred dollars, the minimum of one hundred dollars per month should be applied in payment of such aggregate sum. *Watson Coal, etc., Co. v. Casteel, 296*

MINOR.

See CRIMINAL LAW, 2, 5; GUARANTY, 3.

MITIGATION OF DAMAGES.

See FALSE IMPRISONMENT, 6.

MORTGAGE.

See CHATTEL MORTGAGE; JUDGMENT, 1 to 3; PARTITION, 1; REAL ESTATE, ACTION TO RECOVER; RECEIVER, 2.

1. *Foreclosure.—Equities of Subsequent Purchasers of Real Estate.*—Where suit is brought for the foreclosure of a mortgage on real estate which, after the execution and record of such mortgage, or with notice thereof, has been encumbered or conveyed in different parcels, at different

dates, in favor of or to different persons, and the junior encumbrancers, or grantees, are defendants to such suit for foreclosure. the different parcels of such real estate, so encumbered or conveyed by the mortgagor before such foreclosure, will be ordered to be sold in such parcels for the payment of the mortgaged debt, in the inverse order of such junior encumbrance or conveyance thereof by the mortgagors.

Hahn v. Behrman, 120

2. *Same.*—But, if, at the time of the foreclosure, the original mortgagor owned any part or parcel of the mortgaged property, free from any junior incumbrance thereon, such part or parcel must be ordered to be sold first, for the payment of the mortgage debt and costs, before any sale can be made of any other part or parcel of the mortgaged premises. *Ib.*
3. *Foreclosure.—Mortgage Lien.—Merger.—Extinguishment.*—A decree of foreclosure merges the right of action, but not the lien of the mortgage. *Evansville Gas-Light Co. v. State, 219*
4. *Same.—Order of Court.*—Where the original mortgagor has made several conveyances to different persons, the court will, upon foreclosure, decree that the parcels shall be sold in the inverse order of the dates of the conveyances; but this rule applies only where the mortgage is a lien resting alike upon the whole of the land. *Ib.*
5. *Foreclosure.—Attachment.*—A mortgage may be foreclosed in an attachment proceeding, and a party purchasing the mortgaged land, under such proceeding, holds it discharged of the mortgage. *Sharts v. Awalt, 304*
6. *Evidence.—Record.*—In an action to foreclose a mortgage, A., who was made a party defendant, answered, setting up a purchase of the mortgaged land, under certain attachment proceedings against the assignee, in which the maker was garnished; and, on the trial, the record of said attachment and garnishment proceedings was offered in evidence.
Held, that the evidence was competent. *Ib.*
7. *Sale of Mortgaged Premises Under Execution.—Redemption, Effect of.—Lien.—Foreclosure.—Parties.—Injunction.*—A. executed a mortgage on real estate to B., which was duly recorded. Subsequently a judgment was rendered against A., on which an execution was issued, and such real estate sold thereunder, and after the year for redemption had expired, a sheriff's deed therefor was executed to C., the assignee of the certificate of sale. Afterward B. foreclosed his mortgage, C. being made a party to the action, and under the decree the real estate was sold, B. becoming the purchaser for a nominal sum. Before the year for redemption expired, C. redeemed said real estate by paying into the clerk's office the amount, with interest, for which it was sold. Shortly thereafter B. sued out another order of sale on his judgment. Suit by C. to enjoin a sale thereunder.
Held, that such suit would not lie.
Held, also, that, under the sheriff's deed, C. acquired only the title and interest which A. had in the real estate at the time of the rendition of the judgment, and therefore subject to the lien of B.'s mortgage.
Held, also, that the redemption by C. from the sale to B. did not free such real estate from the lien of B.'s mortgage for the unpaid balance of the mortgage debt.
Held, also, that C. was a proper party to the suit for foreclosure.
Held, also, that in such a case the mortgaged property remains a security for the unpaid balance of the mortgage debt, the collection of which the creditor may enforce by causing a resale by the sheriff of the mortgaged premises under an *alias* order of sale on his judgment of foreclosure, as often as there is a redemption from the sale thereof, and until the mortgage debt has been satisfied. *Smith v. Moore, 388*

8. *Heirs of Deceased Mortgagor.—Real Estate.*—A mortgage on real estate, made by a decedent in his lifetime, his wife not joining, is good as against his heirs other than the widow, and is good as against her, if given for purchase-money. *Walters v. Walters, 425*
9. *Taking of New Mortgage for Old.—Lien.*—The taking of a new note and mortgage, by the mortgagee, for the same debt, upon the same lands, will not discharge the lien of the first mortgage, but the lien thereof will be continued in the new mortgage. But, if the new note and mortgage were taken as a payment and satisfaction of the first, or if they were given in settlement of mutual running accounts, of which the first mortgage debt was only a part, the rule would be otherwise. *Ib.*
10. *Consideration.—Parol Evidence.*—The consideration of a mortgage may be shown by parol evidence. *Ib.*

MUNICIPAL CORPORATION.

See CITIES AND TOWNS.

NAMES.

See DITCHES AND DRAINS, 4.

Parties.—Demurrer.—Supreme Court.—Where, in a complaint, the surname only of a party is given, such defect can not be reached by demurrer for want of facts; nor can objection for such defect be raised, for the first time, in the Supreme Court by an assignment as error of the want of sufficient facts to constitute a cause of action.

Hahn v. Behrman, 120

NEGLIGENCE.

See CITIES AND TOWNS, 14; DAMAGES, 1 to 3; PLEADING, 16, 17; PROMISSORY NOTE, 20.

1. *Attorney.—Notary.—Chattel Mortgage.—Damages.—Contract.—Pleading.*—Where an attorney who is a notary undertakes and agrees, for a consideration, to draw a chattel mortgage and to make certificate of the acknowledgment of its execution, and also agrees to deliver such mortgage, without additional compensation, to the recorder of the county for record, within ten days from its execution, and cause the same to be recorded, for failure to perform the latter undertaking, whereby the lien of said mortgage is lost, he is liable for the damages sustained by reason thereof; and, in an action for such failure, the averment and proof of the former undertaking are pertinent. *Stott v. Harrison, 17*
2. *Same.—Failure to Affix Notarial Seal.*—The failure of such notary to affix his seal to such acknowledgment, it being his duty and within his power to do so under his employment, is no defence to such action. *Ib.*
3. *Same.—Measure of Damages.—Price of Property Sold on Execution not Conclusive on Stranger as to Value.*—In such action, the amount for which such mortgaged property was sold on execution is not conclusive as to its value against the plaintiff, who was a stranger to such writ. *Ib.*
4. *Railroad.—Rate of Speed of Trains.*—In an action by the administrator of a decedent against a railroad company for causing his death at a railroad crossing, by negligently running a train of cars over such crossing, the rate of speed of such train, in connection with other circumstances, may be considered in determining the question of negligence; but the rate of speed at which a train can be run with safety to the passengers can not, in itself, be deemed carelessness as against one who is injured thereby at such a crossing. *Terre Haute, etc., R. R. Co. v. Clark, 168*

5. *Contributory Negligence.—Damages.*—Where, in such action, it is shown that the deceased, possessed of all his faculties, and knowing the existence and location of the railroad, and presumably familiar with the time of the trains running thereon, approached the railroad crossing in a covered wagon, with no opening except in front, without stopping still at any point to look or listen for an approaching train, and for a distance of more than forty yards from such crossing, drove his team in a trot, without stopping or looking, until he reached the crossing where he was run over and killed, such conduct is contributory negligence on the part of the deceased, and is sufficient to bar an action by his administrator to recover damages for his death. *Ib.*
6. *When Railroad Company Liable for Injury to Employee by Negligence of Co-Employee.*—While a railroad company is not responsible to one employee for an injury resulting from the mere negligence or incompetence of a co-employee, engaged in the same general undertaking, it is liable, in such case, where the company has been guilty of negligence in the employment of, or, after notice, continuing in employment, the negligent or incompetent employee, thereby conducing to the injury. *O. & M. R. W. Co. v. Collarn, 261*
7. *Same.—Question of Law and Fact.*—Generally, where the facts of a case are undisputed, the effect of them is for the judgment of the court, and not for the decision of the jury, and this is true in that class of cases where the existence of such facts comes in question, rather than where deductions or inferences are to be made from them; but if, from the facts proven, different minds may draw different conclusions, the case may be properly left with the jury. *Ib.*
8. *Same.—Negligence of Engineer.*—Where the engineer of a locomotive places it in the hands of a fireman incompetent to manage it, contrary to the rules of the railroad company in whose employ he is, he is guilty of negligence. *Ib.*
9. *Same.*—A railroad company is guilty of negligence in permitting its order, forbidding firemen to handle its engines, to be violated by its engineers, and retaining them in its employ, after notice of their practice of abandoning their engines to the firemen, which practice led to the placing of an engine in the hands of a careless and incompetent fireman, whereby injury to a co-employee occurred. *Ib.*
10. *Same.—Notice to Agent.—Notice to Principal.*—Notice to the master mechanic of such company, whose duty it was to employ and discharge engineers and firemen, of their practice in violating its orders, is notice to the company. *Ib.*
11. *Same.—Damages.—Province of Jury.*—It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal loss and injuries, and, unless the damages are such as to induce the belief that the jury must have acted from prejudice, partiality or corruption, their verdict ought not to be disturbed. *Ib.*

NEW TRIAL.

See JUDGMENT, 4; PARTITION, 4; PRACTICE, 1, 10; SLANDER, 3; SUPREME COURT, 11, 28, 30; VENIRE DE NOVO.

1. *Newly-Discovered Evidence.—Diligence.*—Where a new trial is asked on account of newly-discovered evidence, due diligence must be shown to have been used before the trial, and the general statement in the affidavit, that such diligence was used, is not sufficient to overcome the manifest presumptions against its use, arising from all the facts in the case. *Toney v. Toney, 34*
2. *Evidence.—Practice.*—A cause for a new trial on account of the admission of alleged improper testimony will not be considered by the Supreme Court, unless such testimony appears in the record. *City of Huntington v. Mendenhall, 460*

3. *Harmless Error*.—A harmless error in admitting evidence will not warrant the granting of a new trial. *Ib.*
4. After the term at which a judgment is rendered a new trial can be had only on complaint, and for causes discovered after the trial. *Hannah v. Dorrell, 465*
5. *Newly-Discovered Evidence*.—*Diligence*.—To obtain a new trial on account of newly-discovered evidence, due diligence must be shown in endeavoring to obtain proof, on the first trial, of the facts sought to be established. *Arms v. Beitman, 85*

NOTARY PUBLIC.

See NEGLIGENCE, 1, 2.

NOTICE.

See AGENT; CITIES AND TOWNS, 12, 13, 14; CRIMINAL LAW, 7; FRAUDULENT CONVEYANCE, 2, 8; HIGHWAY, 2, 3, 5; MECHANIC'S LIEN, 2, 5; NEGLIGENCE, 10; NOTICE OF SALE; PRINCIPAL AND SURETY, 3; PROMISSORY NOTE, 8; RECEIVER, 1; SUPREME COURT, 27.

NOTICE OF SALE.

See PLEADING, 4.

1. *Liveryman's Lien*.—*Requisites of Notice of Sale Under*.—Notice of the time and place of the sale of property by a liveryman, to satisfy his lien thereon, if the value thereof is ten dollars or more, is sufficient if given by publishing the same three weeks successively in a newspaper in the county. *Shappendocia v. Spencer, 128*
2. *Same*.—Notice that a sale will be made "on the — day of —, 1877," is not a notice of the time and place of sale. *Ib.*

NUISANCE.

See CITIES AND TOWNS, 5 to 8; CRIMINAL LAW, 1; INJUNCTION.

1. *Obstructing Highway*.—What at common law was a public nuisance is such under the statute, and the permanent obstruction of a public highway is *per se* a public nuisance. *State v. Berdett, 185*
2. *Same*.—Where the unlawful act of obstructing a public highway injures others than those owning real estate upon the street, such act is of itself a public nuisance. *Ib.*
3. *Same*.—*Encroachment on Public Street, Nuisance*.—A permanent structure, materially encroaching upon a public street, in a thickly inhabited part of a large city, is a nuisance *per se*. *Ib.*
4. *Location*.—*Private Nuisance*.—Whether a thing is or is not a nuisance does not depend upon the notions of persons living in the particular locality; although a business, in some localities, will be considered a nuisance, which, in another, would not be so considered. *Owen v. Phillips, 284*
5. *Same*.—A lawful business may be so conducted as to become a nuisance. *Ib.*

NUNC PRO TUNC ENTRY.

See SUMMONS, 4.

OFFICE AND OFFICERS.

See BOND, 3; CIRCUIT COURT, 2; COUNTY COMMISSIONERS.

OFFICIAL BOND.

See BOND.

OPINION.

See JUROR.

ORDINANCE.

See CITIES AND TOWNS, 2 to 4.

OUTSTANDING TITLE.

See FRAUDULENT CONVEYANCE, 9.

PARTIES.

See LIQUOR LAW, 5; MORTGAGE, 7; NAMES; PARTITION, 5; PROMISSORY NOTE, 18.

PARTITION.

See HUSBAND AND WIFE, 3; JUDICIAL SALE, 4, 6; PROCEEDING SUPPLEMENTARY TO EXECUTION, 2; WILL, 6.

1. *Sale of Property Free from Mortgage and Judgment Liens.—Transfer of Liens to Proceeds of Sale.*—In a suit for partition of real estate, the court ordered the property to be sold, and the proceeds of such sale, after payment of costs, be paid into court, subject to the further order of the court and the rights of the mortgage and judgment creditors in and to the same.
Held, that such order must be construed to mean that the commissioner should sell the land free from the mortgage and judgment liens, and that such liens should be transferred to and satisfied from the proceeds of such sale as the court might thereafter direct. *Fouty v. Morrison*, 333
2. *Sale of Real Estate.—Disposition of Proceeds.*—Where real estate, in a proceeding for partition, is sold, the court should order the proceeds to be divided among the parties, according to their respective interests.
Chisham v. Way, 362
3. *Erroneous Order.—How Cured.—Trustee.—Widow.*—A. died seized of certain real estate, leaving a widow, by whom he had no children, and two children by a former wife, and such real estate, in a proceeding for a partition, was sold.
Held, that where the court appointed a trustee to take charge of one-third of the proceeds of said sale for the benefit of the widow, and afterward erroneously ordered said fund to be paid to her, but the record is not in a condition to enforce such order, equity will retain the fund in the hands of the trustee, to be rightfully divided on the application of any party in interest. *Ib.*
4. *Objections to Report of Commissioners.—New Trial.—Assignment of Error.—Practice.—Supreme Court.*—Rulings on objections filed to the confirmation of the report of commissioners appointed to partition real estate can not be presented to the Supreme Court by an assignment of error on the overruling of a motion for a new trial, but must be presented by an assignment of error directly on the rulings of the court on such objections, on exceptions saved to such rulings, by a bill of exceptions. *ELLIOTT, J.*, dissents. *Clark v. Stephenson*, 489
5. *Same.—Parties.—Lien-Holders.*—Lien-holders on real estate are proper parties in a suit for partition thereof. *Ib.*

PARTNERSHIP.

1. *Receiver.—Property.—Execution.*—When a member of a partnership dies, and a receiver is appointed who takes possession of the partnership property, no creditor has a right to have such property seized and sold on execution for his own benefit. *Knode v. Baldrige*, 54
2. *Partner's Interest.*—A third person can not, by buying the interest of one partner, become a member of the firm, unless all the partners consent. *Love v. Payne*, 80
3. *Same.*—The admission of a partner into a firm is not within the line of the partnership business. *Ib.*

4. *Power of Member to bind Firm.—Contract.—Sale of Partner's Interest.—Ratification.—Instruction.*—B., a member of a partnership and its business manager, contracted with A., that, if he would buy a retiring partner's interest, and pay the balance due upon such partner's share of the capital stock, he should receive a certain interest in the partnership property, free from all liens. Afterward, all the partnership property was sold upon a prior mortgage. Suit by A. against the firm for breach of the contract.

Held, that B. had no authority to make such contract.

Held, also, that, unless the partners had knowledge thereof, they were not bound.

Held, also, that the mere coming of A. into the firm, and the payment of money into the capital stock, are not, of themselves, sufficient to charge the firm with knowledge of such contract.

Held, also, that it was error to instruct the jury that the firm would be bound by accepting the benefits of the contract.

Held, also, that, by receiving A., and taking his money, into the firm, they did not ratify that stipulation of the contract, of which they were ignorant, guaranteeing a perfect title, it not being incident to, or implied in, the admission of A. as a member of the firm. *Ib.*

PAYMENT.

See BANKRUPTCY; PROMISSORY NOTE, 6.

Application by Creditor.—A creditor has the right to apply a payment to either a note or book account held by him against a debtor in the absence of any application by such debtor. *Brownlee v. Goldthait*, 481

PENALTY.

See CITIES AND TOWNS, 2 to 4; CONTRACT, 1; DECEDENTS' ESTATES, 7; MINING LEASE; REPLEVIN, 3.

PERSONAL JUDGMENT.

See MARRIED WOMAN, 1; MECHANIC'S LIEN, 4, 5.

PLEADING.

See BASTARDY, 2; BOND, 3; CITIES AND TOWNS, 2, 10; CONTRACT, 1; CRIMINAL LAW, 1, 2, 12; DAMAGES, 2; DECEDENTS' ESTATES, 4, 6; FALSE IMPRISONMENT, 2; FRAUDULENT CONVEYANCE, 2 to 4; GUARANTY, 3; HIGHWAY, 12; LIFE-ESTATE, 3; LIQUOR LAW, 6; MECHANIC'S LIEN, 1, 2, 3, 5; NAMES; NEGLIGENCE, 1; PRACTICE, 4, 6; PROMISSORY NOTE, 3, 11, 18; RAILROAD, 9; REAL ESTATE, ACTION TO RECOVER; RECEIVER, 2; SUPREME COURT, 16; WILL, 4.

1. *Practice.—Reply.—Waiver.*—Going to trial without a reply is a waiver thereof; and, upon the trial, the matter of the answer is deemed controverted, as upon denial. *Carriger v. Sicks*, 76

2. *Complaint.—Relief.*—The relief to which a plaintiff is entitled must be limited to the case made by his complaint.

Sohn v. Marion, etc., Gravel R. Co., 77

3. *Practice.—Replevin.—Lien.*—Where, in an action for the recovery of personal property, the answer averred that "on said — day of —, 1876," the defendant acquired a lien thereon, an objection that such answer fails to show when the lien accrued can not be reached by a demurrer for want of facts, but by a motion to make more specific.

Shappendocia v. Spencer, 128

4. *Same.—Notice of Sale.*—In such case, neither the notice of the time and place of the sale of the property, under such lien, nor a copy thereof, is a necessary part of the answer. *Ib.*

5. *Same.—Invalid Sale.*—Where, in such action, the answer shows that the defendant has a valid lien under the statute on the property sold, it is sufficient without regard to the validity of the sale. *Ib.*

6. *Replevin Bond.—Complaint.—Principal and Surety.*—In a complaint on a replevin bond for a breach thereof in failing to return the property after a judgment therefor, it is not necessary to aver who were sureties and who principals in the bond, or to file copies of the writ of replevin and the return of the officer thereon, with such complaint. *Shappendocia v. Spencer, 133*
7. *Description of Personalty.*—In an action for the recovery of personal property, the complaint must describe the property claimed, and a description thereof in one paragraph can not be supplied by reference to another paragraph. *Entsminger v. Jackson, 144*
8. *Same.—Each Paragraph Must be Complete.*—Each paragraph of a pleading must be complete within itself, and can not be aided or supplied by reference to the allegations of another paragraph. *Ib.*
9. *Same.—Complaint.—Demurrer.—Action to Recover Personalty.*—A complaint in such action, alleging merely that the plaintiff is the owner of certain personal property, and not that he is entitled to the possession thereof, and containing no allegation that such property has been either wrongfully taken or unlawfully detained, is insufficient on demurrer. *Ib.*
10. *Injunction Bond.—Record.—Variance.—Exhibits.*—In an action upon an injunction bond, it is necessary to file such bond, or a copy thereof, with the complaint as an exhibit; but a copy of the record of the injunction suit ought not to be filed therewith, and, if so filed, any variance between the complaint and such copy is immaterial. *Cress v. Hook, 177*
11. *Same.—Proof of Averments of Complaint.*—Where, in such action, the plaintiff, who was a clerk in a drug store, alleged in his complaint that the defendants had obtained an order restraining him "from pursuing his said employment," such allegation is supported by proof of an order restraining him from selling, removing, or otherwise disposing of or encumbering, etc., such stock of drugs. *Ib.*
12. *Promissory Note.—Endorsement.*—In an action by the endorsee of a promissory note against the maker, it is not necessary to set out in the complaint a copy of the endorsement, although proof of the endorsement under which he claims title is necessary to a recovery. *Morgan v. Smith Am. Organ Co., 179*
13. *Answer.—Contract.*—A contract can not be confessed and avoided, and also denied, in the same paragraph of answer. *Woollen v. Whitacre, 198*
14. *Damages, Direct and Consequential.—False Representation.—Fraud.—Practice.—Demurrer.*—In an action for damages, the complaint alleged that the plaintiff was engaged in a business which required him to own and use horses and mules, and at a certain time he was the owner of several horses and mules, of a specified value; that at that time the defendant, for the purpose of inducing the plaintiff to purchase a horse from him, falsely and fraudulently represented that such horse was sound, except a slight distemper; that the plaintiff, believing said false representation to be true, purchased such horse, which at the time had a contagious and deadly disease, of which plaintiff was ignorant; that said horse communicated the disease to the plaintiff's horses and mules, from which they ultimately died. Prayer for value of horses and mules, and damages.
Held, that the complaint was sufficient on demurrer, and stated a good cause of action, both for direct and consequential damages.
Held, also, that an objection that the allegations of the complaint were too indefinite must be made by motion to make specific, and could not be reached by demurrer. *Knox v. Wible, 233*

15. *Judgment.—Written Instrument.*—A judgment, or a transcript thereof, is not a written instrument which must be filed with a pleading setting up such judgment, and if filed therewith forms no part, and can not be considered in determining the sufficiency, of such pleading.
Berry v. Reed, 235
16. *Negligence.—Railroad.—Injury to Employee.—Evidence.*—A complaint against a railroad company for damages to the person of an employee, charging the negligence by which the plaintiff was injured directly upon the defendant, and not merely upon its employees, is sufficient on demurrer; and proof may be given thereunder of any acts or circumstances of negligence, on the part of such defendant, in the running of the locomotive causing the injury.
Ohio, etc., R. W. Co. v. Collarn, 261
17. *Same.—Practice.*—Uncertainty in the allegation of negligence in such complaint is a defect that can not be reached by demurrer, but by motion to make specific.
Ib.
18. *Complaint.—Variance.*—In a suit upon a written instrument, where there is a material variance between the copy filed and the allegations of the complaint, the copy will control.
Watson Coal, etc., Co. v. Casteel, 296
19. *Common Carrier.—Answer.—Demurrer.*—In an action against a railway company for injury to stock shipped on the company's cars, the company answered as follows: "That the plaintiff received the stock from the defendant in good condition, and paid the freight thereon, and gave defendant no notice that said stock was not delivered to him in good order, and made no demand for any damages on account of any injuries, or supposed injuries, to said stock."
Held, on demurrer, that the answer was not good in confession and avoidance, and at best could be deemed only an argumentative denial.
O. & M. R. W. Co. v. Nickless, 382
20. *Same.—Harmless Error.*—It is not error to wrongfully sustain a demurrer to a paragraph of an answer, if the facts averred could have been proved under another paragraph.
Ib.
21. *Certainty.—Waiver.*—A mere want of certainty in a complaint is waived by a general denial. Such complaint, unobjected to, is good after verdict.
City of Huntington v. Mendenhall, 460
22. *Can not be Answer and Cross Complaint.—Practice.*—A single pleading can not be both an answer and a cross complaint, but must be classified according to its averments; and, if a pleading is in all essential respects a cross complaint, objections to it as an answer raise no question upon it as a cross complaint.
Stockton v. Stockton, 510
23. *Exhibits.*—Where exhibits are of such a character as not to become a part of a pleading by being filed with it, a demurrer to the pleading raises no question upon them or their validity, and the sufficiency of such pleading must be determined by its averments.
Briscoe v. Johnson, 573

PRACTICE.

See ATTORNEY; CRIMINAL LAW, 9, 10; DECEDENTS' ESTATES, 4; FALSE IMPRISONMENT, 2, 3; INSTRUCTIONS; JURISDICTION, 4; MECHANIC'S LIEN, 3; NEW TRIAL, 2; PARTITION, 4; PLEADING, 1, 3, 14, 17, 22; PROMISSORY NOTE, 1, 3, 4; RAILROAD, 1; RECEIVER, 2; SPECIAL FINDING; STATUTE OF FRAUDS, 3; SUMMONS, 2; SUPREME COURT; WITNESS, 2.

1. *Assignment of Error.—Change of Venue.—New Trial.*—Alleged error in granting a change of venue must be assigned as cause for a new trial, to present such question on appeal to the Supreme Court.
Walker v. Heller, 46

2. *Bill of Exceptions.—When Must be Filed.—Extension of Time.*—When a new trial is claimed on the ground that the verdict or finding is not sustained by the evidence, or is contrary to law, the court, at the time of overruling the motion, may give time to prepare bills of exception showing the evidence, but exceptions generally must be taken at the time the decision is made, and must be reduced to writing within the term at which the decision is made, unless the time is extended beyond the term by an order of the court made during the term.
Sohn v. Marion, etc., Gravel R. Co., 77
3. *Demurrer.—Motion in Arrest.—Judgment.*—A court does not, by ruling wrongly upon demurrers, preclude itself from afterward ruling rightly upon a motion in arrest of judgment. It is the duty of the court not to permit a judgment upon a complaint so clearly insufficient as to afford no foundation therefor. *Newman v. Perrill, 153*
4. *Pleading.—Verdict.*—A pleading will be sustained after verdict by every reasonable intendment that can be made from the facts pleaded; but the absence of an essential allegation can not be cured thereby. *Ib.*
5. *Answers to Interrogatories.—Verdict.—Judgment Non Obstante.—Bill of Exceptions.—Supreme Court.*—An exception to the ruling upon a motion for judgment upon answers to special interrogatories, notwithstanding the general verdict, presents such question to the Supreme Court without any bill of exceptions.
Terre Haute, etc., R. R. Co. v. Clark, 168
6. *Motion to have Pleading made Specific.—Supreme Court.*—Defects and uncertainties in a pleading which states sufficient facts can not be reached by demurrer, but only by a motion to make certain or to supply the defect; and the Supreme Court will not reverse a judgment on account of the refusal of the court to sustain such a motion, unless it be made to appear that the party has, or reasonably may be presumed to have, suffered harm from such ruling.
Trayser Piano Co. v. Kirschner, 183
7. *Demurrer to Evidence.*—On a demurrer to the evidence, the court is bound to take as true all the facts which the evidence tended to prove, and such inferences from them as the jury could fairly have drawn, though the jury might not have drawn them.
O. & M. R. W. Co. v. Collarn, 261
8. *Presumption.—Evidence.—Supreme Court.*—If one of two paragraphs of complaint is good, the Supreme Court will presume, on appeal, that the court below, on overruling a demurrer to the evidence, applied the evidence to the good paragraph, and not to the bad paragraph. *Ib.*
9. *When Interrogatories May be Filed.—Harmless Error.*—It is not necessary that interrogatories be filed at the time of filing any specific pleading. They may be filed at any time before the issues in the case are closed. The error, if any, in compelling a party to answer interrogatories is harmless, where such interrogatories are not offered in evidence.
Sherman v. Hogland, 472
10. *New Trial.*—When the motion for a new trial is not filed within the term at which the verdict was rendered, no error can be assigned thereon in the Supreme Court. *Higgins v. Kendall, 522*
11. *General Verdict.—Answers to Interrogatories.—Erroneous Decree.—Failure to take Exception.*—A general verdict will not be controlled by answers to interrogatories, if reconcilable therewith upon any supposable state of facts that might be proved under the pleadings and issues in the case. Where no exception has been taken to a decree rendered, and no motion made for its modification, the question of the correctness of such decree can not be raised in the Supreme Court. *Ib.*

12. *Directions to Jury.—Oral Instructions.*—Oral directions to a jury to sign their general verdict, or to answer interrogatories, are not instructions within the meaning of the law. *McCallister v. Mount*, 559
13. *Evidence.—Objection.*—An objection, at the conclusion of the testimony of a witness, given in narrative form, that the “defendant excepts to all the evidence in reference to damages to clothing, medical attendance,” etc., is insufficient to reserve any question for the decision of the Supreme Court. *Farman v. Lauman*, 568
14. *Exception to Exclusion of Evidence.*—In order to save an exception to the action of the court in excluding questions asked a witness, an offer should be made to prove the facts sought to be elicited. *Ib.*
15. *Attorney.—Argument to Jury.—Change of Venue.*—The fact that the venue of a cause had been changed is not a proper subject to be mentioned or commented upon by counsel in the argument to the jury. *Ib.*
16. *Objection.—Exception.—Supreme Court.*—An objection, not followed by an exception, is not available on appeal to the Supreme Court. *Ib.*
17. *Withdrawal of Evidence from Jury.—New Trial.—Supreme Court.*—Where evidence is permitted, over an objection, to go to the jury, the court reserving the right to withdraw it, which the court afterward does, telling the jury that it was inadmissible, and they should not consider it, a cause for a new trial, alleging the exclusion of such evidence with sufficient particularity to call the attention of the court to the ruling complained of, is sufficient to present the question to the Supreme Court. Nor is it necessary, in such case, that, at the time the exception is taken, a statement of the character or purpose of the evidence should be made. *Lawler v. McPheeters*, 577
18. *Same.—Harmless Error.*—It is not error to sustain a demurrer to a good reply, where there is no complaint on file; and striking out portions of such reply was harmless, whether it remained good or bad. *Heizer v. Kelly*, 582
19. *Same.—Amended Complaint.—Exhibits.*—A complaint, to which a demurrer has been sustained at one term of the court, can not be treated as an amended complaint by simply filing exhibits at the next term, without also refiling such complaint therewith. *Ib.*

PRESUMPTION.

See BOND, 3; CONTRACT, 2; CRIMINAL LAW, 3; EVIDENCE, 1; INSTRUCTIONS, 4; JURISDICTION, 3; LEGAL DISABILITY; PRACTICE, 8; REAL ESTATE, ACTION TO RECOVER, 2; SUPREME COURT, 1, 12, 16, 28, 37; WILL, 4.

PRINCIPAL AND AGENT.

See AGENT; HIGHWAY, 4; NEGLIGENCE, 10; PROMISSORY NOTE, 11.

PRINCIPAL AND SURETY.

See BOND, 1 to 4; PLEADING, 6; PROMISSORY NOTE, 5, 10, 21, 22, 24.

1. *Levy and Sale of Principal's Property.*—The statute providing for the levy and sale of a principal's property, before resorting to that of a surety, has no application to cases where such property is in the control and custody of the court. *Knøde v. Baldridge*, 54
2. *Surety.—Contribution.—Decedents' Estates.—Claim.—Final Settlement.*—An action for contribution can not be maintained against the heirs of a decedent, who had been surety on the bond of a guardian, by a subsequent surety thereon, for money which the latter paid on default of the guardian, until the estate of the decedent has been finally settled. Until such final settlement the proper course is to file such claim against the estate. *Stevens v. Tucker*, 73
3. *Extension of Time.—Notice of Suretyship.—Release.*—In an action by

the assignee, against the several makers, of a promissory note, proof by two of the makers thereof, that they were only sureties for their co-makers, and that such assignee, after the maturity of the note, in consideration of interest paid in advance, agreed with the principal, without their knowledge or consent, to extend the time of payment for a definite period, will not release such sureties, unless the assignee had notice of such relation between the makers when such agreement was made.

Arms v. Beitman, 85

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

See SUPREME COURT, 31.

1. *Nulla Bona.*—By sections 518 and 522 of the code, a return of *nulla bona* on an execution against the property of a judgment debtor is sufficient to entitle the judgment plaintiff to prosecute the proceedings supplementary to execution therein provided.
Sherman v. Carvill, 126
2. *Same.—Proceeds of Partition Sale.*—The net proceeds of a partition sale, belonging to a judgment debtor, in the hands of the commissioner appointed in the action for partition to sell the real estate, may be reached by a judgment creditor in proceedings supplementary to execution.
Ib.
3. *Same.—Burden of Proof.*—The sale of the real estate for the price charged in the complaint being admitted, the burden was on the defendants to show what disposition had been made of the share of the judgment debtor.
Ib.
4. *Same.—Voluntary Assignment of Proceeds.*—A voluntary assignment of such proceeds by the debtor is void against creditors.
Ib.

PROCEEDS OF PARTITION SALE.

See PROCEEDINGS SUPPLEMENTARY TO EXECUTION, 2 to 4.

PROCESS.

See RECEIVER, 1; SUMMONS, 3, 4.

PROMISSORY NOTE.

See BOND, 5; DECEDENTS' ESTATES, 4; FORMER ADJUDICATION, 1; GUARANTY; MORTGAGE, 9; PLEADING, 12; PRINCIPAL AND SURETY, 3; SUPREME COURT, 16.

1. *Counter-Claim.—Arrest of Judgment.—Practice.*—A motion in arrest of judgment, by the endorser of a promissory note, in a suit by the holder against the maker and endorser, will not raise any question arising upon a counter-claim, filed by the maker against such endorser.
Carriger v. Sicks, 76
2. *Payable in Bank.—Fraud in Procuring Signature.—Innocent Holder.*—Where a note is executed payable at a bank in this State, on the false and fraudulent representations of the payee, the maker believing it to be an instrument of a different character, such maker is liable for the amount of such note in the hands of an innocent endorsee, before maturity, and for value.
Woollen v. Whitacre, 198; Woollen v. Wise, 212
3. *Unverified Answer in Denial.—Practice.*—In an action by an endorsee on a promissory note, where proof of the matters alleged in an answer would not avoid such note in the hands of a *bona fide* holder, such answer is insufficient on demurrer; and a plea denying the execution of the note, not verified, imposes no other burden on the plaintiff than to produce and give in evidence such note.
Ib.
4. *Evidence.*—Under an unverified answer in denial, evidence that the note in suit is a forgery, or was not executed by the defendant, is inadmissible.
Ib.

5. *Surety.—Failure of Consideration.—Contract.*—Where the payee of a note induces another to become surety thereon, by agreeing that he would deliver to the maker a previous note and chattel mortgage for cancellation, so that such surety might indemnify himself by obtaining a first mortgage on the property mortgaged, a failure and refusal to comply with such agreement constitute a failure of consideration as between such payee and surety. *Jeffries v. Lamb, 202*
6. *Payment.*—A promissory note not payable at a bank, and not governed by the law merchant, given for a precedent debt, will not operate, unless by express agreement, as a payment or extinguishment of such debt.
7. *Construction of.—Interest.*—A promissory note, drawing ten per cent. interest, contained the stipulation that if the makers "should pay the same before it becomes due, which they have the privilege of doing at any time, ten per cent. per annum is to be deducted from the amount of said note for the unexpired time thereof."
Held, in an action thereon, that the maker had reserved the right to take up the note at any time by paying the principal sum named in it, together with the interest due at the time of payment, deducting only the ten per cent. interest per annum which would otherwise thereafter accrue upon the note.
Held, also, that "the amount of said note" meant the gross sum due upon it, both principal and interest. *Bailey v. McClure, 275*
8. *Assignment. Notice.*—The owner by assignment, of a promissory note not governed by the law merchant, holds the same subject to all legal rights of third persons, acquired against the maker on account of indebtedness, before notice of the assignment. *Sharts v. Awalt, 304*
9. *Judicial Sale.*—The owner by assignment, of a promissory note not governed by the law merchant, can not disturb the legal rights of a third person, acquired through a proper judicial proceeding against the maker of the note, before notice of the assignment. *Ib.*
10. *Principal and Surety.—Forgery.*—When the name of one of two more obligors in a bond, note or other writing obligatory has been forged, the other co-obligor, though a surety only, and though he signed in the belief that the forged name was genuine, is nevertheless bound, if the payee or obligee accepted the instrument without notice of the forgery. *Helms v. Wayne Agricultural Co., 325*
11. *Same.—Principal and Agent.*—Where a creditor sends a note either in blank or filled up, as to the amount thereof, to his debtor, with a request that he get security thereon, the debtor does not thereby become the agent of the creditor for the purpose of procuring such security. *Ib.*
11. *Pleading.—Bankruptcy of Makers.—Endorser.*—In an action by the assignee of a promissory note, against the endorser, the complaint alleged that, before its maturity, the makers were adjudged bankrupts in the proper court, and that the matter of their bankruptcy was still pending.
Held, on demurrer, that such complaint, for want of an averment that there are no assets in the hands of the assignee, out of which any part of the note can be paid, is insufficient. *Somerby v. Brown, 353*
12. *Same.—Insolvency.*—Where a paragraph of complaint sufficiently avers the insolvency of the makers of said note at and subsequent to its maturity, but avers nothing as to their bankruptcy, it is necessary to prove, not only that the makers were adjudged bankrupts, but also that no assets came into the hands of the assignee in bankruptcy, sufficient to pay any part of such note. *Ib.*
13. *When Governed by Law Merchant.—Statute Construed.*—Under section 6, 1 R. S. 1876, p. 636, no other notes but those payable in a bank in this State are put upon the footing of bills of exchange, and governed by the law merchant; and a note "payable at the Indiana Banking

Company, of Indianapolis, Indiana," is not payable in or at a bank, or the office, banking-house, or place of business of a bank, and is not within the terms of the statute, and is not governed by the law merchant. *Rominger v. Keyes*, 375

14. *Same.—Estoppel.*—If the contract of the makers of such note had been with such company, they would be estopped to deny its existence at the time of the contract. *Ib.*

15. *Consideration.—Written and Parol Evidence.*—The consideration of a note may always be shown, either by written or parol evidence, and the fact that a part of the evidence has been reduced to writing, will not exclude the oral part thereof. *Everhart v. Puckett*, 409

16. *Agreement not to Defend Divorce Suit Void.—Public Policy.*—An agreement, that a defendant in a divorce suit will not make any defence, is void as against public policy, and a note executed upon such a consideration can not be enforced against the maker. *Ib.*

17. *Blending of Void and Valid Consideration.*—Where the illegal and void part of the consideration of a note is so indefinite and uncertain that it can not be separated from the legal part, the whole note is rendered void. *Ib.*

18. *Assignment.—Pleading.—Complaint.—Demurrer.—Defect of Parties.*—In an action on a promissory note, by an assignee against the maker, the complaint alleged that such "note was endorsed and assigned by the payee to plaintiff."

Held, that such allegation was equivalent to the allegation that the note was assigned by endorsement thereon in writing, and the complaint, in that respect, was sufficient on demurrer for want of facts.

Held, also, that, if the assignment was not in accordance with the statute, the demurrer should have been for defect of parties.

Hill v. Shalter, 459

19. *Assignment by Delivery.—Defences Permitted to Maker.*—A note payable in a bank in this State is negotiable as an inland bill of exchange, and where the payee assigns such note by delivery merely, the holder has an equitable title, and the right to sue thereon in his own name, by making the payee a party defendant; but such assignment does not cut off any defences which the maker may have as against the payee. *Foreman v. Beckwith*, 515

20. *Payable in Bank.—Fraud in Procuring.—Negligence of Maker.—Bona Fide Endorsee.*—Where one signs a note negotiable by the law merchant, whether he can read or not, relying on the false and fraudulent representation of the payee, that it was something different from a note, and makes no effort to ascertain its tenor, he is liable thereon to a *bona fide* endorsee for a valuable consideration, who took the note before maturity and without notice of the fraud.

Ruddell v. Dillman, 518

21. *Forgery.—Principal and Surety.*—When the name of one of two or more obligors in a bond, note or other writing obligatory, has been forged, the other co-obligor, though a surety only, and though he signed in the belief that the forged name was genuine, is nevertheless bound, if the payee or obligee accepted the instrument without notice of the forgery. *Wayne Agricultural Co. v. Cardwell*, 555

22. *Joint Promissory Note.—Death of Surety.—Decedents' Estates.—Statute Construed.*—Under section 783, 2 R. S. 1876, p. 309, the death of a surety on a joint promissory note does not discharge his estate from liability thereon. *Redman v. Marcell*, 593

23. *Execution on Sunday by Surety Void.*—The execution of a promissory note as surety on Sunday, though delivered by the principal on a week day to the payee, who had no knowledge that the note had been so signed by the surety, is void. *Parker v. Pitts*, 598

24. *Same.—Ratification.*—Where the surety of a note signed by him on Sunday, after it becomes due, notifies the payee that the principal had certain property he might sell and apply on the note, and afterward requests the payee not to sue on the note until he could see the principal, no part of the consideration having been received by the surety, such facts are insufficient to show a ratification of the execution of the note by him. *Ib.*

PUBLIC POLICY.

See PROMISSORY NOTE, 16.

QUO WARRANTO.

See CORPORATION.

RAILROAD.

See DAMAGES, 1 to 3; NEGLIGENCE, 4, 5, 6 to 10; PLEADING, 16.

1. *Practice.—Collateral Questions.*—In a proceeding to enjoin the collection of a tax levied for the construction of a railroad, it is not competent to inquire into questions pertaining to the organization of the railroad company, they having been determined by the board of commissioners as jurisdictional matters. *Brokaw v. Board, etc., 543*
2. *Same.—Appropriation in Aid of.—Limit of Tax.—Statute Construed.*—In a proceeding for an appropriation to aid in the construction of a railroad through a township, under the act of May 12th, 1869, 1 R. S. 1876, p. 736, only two per centum of the assessed value of the taxable property of the township, as shown by the tax duplicate of the preceding year, can be levied at one time, upon one petition and in any one period of two years; but it does not follow that other appropriations can not be made at other times and upon different petitions. *Ib.*
3. *Same.—Appropriation.—Conditions of.*—Under said act of May 12th, 1869, a township may prescribe reasonable conditions, and make its appropriation payable thereon. *Ib.*
4. *Same.—Statute.—Amendment.—Constitutional Law.*—An act, professing to amend a section of a statute which has already been superseded by amendment, is unconstitutional and void. *Ib.*
5. *Same.*—Section 1 of the act of March 8th, 1879, Acts 1879, p. 46, is constitutional. *Ib.*
6. *Same.—Tax Collected.—Where Expended.*—When aid is given by a township for the construction of a railroad through the same, the money need not necessarily be expended on that part of the road within the limits of the township, but it may be expended on the road outside its limits. *Ib.*
7. *Same.—Roads Already Constructed.*—Townships have no right to vote aid to railroads already constructed. *Ib.*
8. *Same.—Constitutional Law.*—The laws providing for appropriations by taxation, for the construction of railroads, are constitutional. *Ib.*
9. *Same.—Pleading.—Answer.*—An answer is not bad because it fails to answer an assumption expressed in a conclusion of law stated by the pleader, and which is altogether unsupported by the specific facts affirmatively alleged in the complaint. *Ib.*
10. *Same.—Appropriation to.—Payment to Company.*—To entitle a railroad company to receive the money appropriated, the road need not be perfect in every respect, but it must be so far completed that it may be properly and regularly used for the transportation of freight and passengers. *Ib.*

RATIFICATION.

See AGENT; PARTNERSHIP, 4; PROMISSORY NOTE, 24.

REAL ESTATE, ACTION TO RECOVER.

See SHERIFF'S SALE, 3, 4.

1. *Pleading.-- Answer.-- Counter-Claim.-- Contract.-- Mortgage.-- Redemption.-- Statute of Frauds. Case Distinguished.*—In an action for the recovery of real estate, A., the defendant, alleged that in March, 1861, he executed to B. a mortgage thereon, which B. in October, 1873, foreclosed, and at the sheriff's sale became the purchaser, and shortly thereafter took a sheriff's deed therefor. On the 16th day of December, 1871, the real estate was sold on a judgment against A. and the certificate of purchase assigned to B. On the 1st day of December, 1872, A., with B.'s knowledge and consent, made a verbal contract with C., his brother, for the redemption of the real estate, and, in pursuance thereof, C. paid to B. a certain sum for which he assigned the said certificate to C., upon which he afterward obtained a sheriff's deed. In March, 1876, a similar agreement was made between A. and C., with the knowledge and consent of B., to redeem from the sale made on the decree of foreclosure, and, in pursuance thereof, C. paid B. a certain sum for which he conveyed the property to C.'s son. Afterward C. and his son conveyed the real estate to the plaintiff, "who had sufficient notice and knowledge to put him on inquiry that the conveyances to said C. and son were solely for the use and benefit of the defendant, and were intended to be and were securities only for the repayment of the money advanced by C." The property, at the time of the agreements and the various sales and conveyances, was in the possession of A., who claimed title thereto. Prayer for affirmative relief.

Held, that such pleading is a counter-claim, and not an answer. It can not be both.

Held, also, that a counter-claim must stand as an independent pleading, and aver facts warranting the relief sought.

Held, also, that, at the time the agreements were made, B. was the owner of the real estate.

Held, also, that the contract upon which the decree of foreclosure was rendered having been made before the redemption law of 1861 was in force, A. had no right to redeem.

Held, also, that such agreements were parol contracts for the purchase of lands and within the statute of frauds.

Held, also, that the allegation that A. was in possession of the land, claiming title, is not sufficient to take the case out of the statute. In order to have this effect, it must be shown that the possession was taken under the parol contracts. *Tinkler v. Swaynie*, 71 Ind. 562, distinguished. *Rucker v. Steelman*, 396

2. *Same.-- Mortgage. -- Agreement.-- Foreclosure. -- Decree.-- Sheriff.-- Presumption.* In such action, a paragraph of answer alleged, that during the pendency of the suit by B. to foreclose two mortgages, one executed prior to the redemption law of 1861, and the other subsequently, no rate of interest being specified therein, an agreement was made between A. and B. whereby judgment was rendered thereon for a certain sum, including the amount due on both mortgages, the judgment to bear interest at the rate of ten per cent. per annum.

Held, that such agreement did not extinguish, or profess to extinguish, the contract upon which the foreclosure suit was founded, and that such judgment rested upon the mortgages and not upon the agreement.

Held, also, that the Supreme Court will presume, in the absence of any showing to the contrary, that the court entered the proper decree upon the mortgages, and that the sale made by the sheriff was in accordance therewith.

Id.

RECEIVER.

See PARTNERSHIP, 1.

1. *Notice of Appointment.—Process.*—Where the appointment of a receiver is prayed for as a measure of final relief, the process that brings the defendant into court to answer the complaint is sufficient notice to him of the final relief sought. *Newell v. Schnull*, 241
2. *Contempt.—Collateral Attack.—Mortgage.—Growing Crop.—Pleading.—Practice.*—On report of a receiver appointed in an action to foreclose a mortgage on real estate, proceedings were instituted against A. for contempt in refusing to yield possession of the wheat ready to be cut, growing on the mortgaged land. A. answered, besides denying that such receiver had ever qualified, that he had not resisted said receiver, but that, on his failure to take possession, he had, under the employment of B., who had actual possession of the wheat under a chattel mortgage made prior to the commencement of the foreclosure suit, and who was not a party thereto, harvested and marketed said wheat, intending no contempt, etc.
Held, that, if the appointment of a receiver was erroneous, it was not void, and could not be collaterally attacked.
Held, also, that A. was not in contempt.
Held, also, that the sufficiency of the complaint in the foreclosure suit can not be questioned collaterally. *Cook v. Citizens Nat'l Bank*, 256
3. *Same.—Appeal.—Interlocutory Order.*—Under section 576 of the code, an appeal to the Supreme Court may be had from an order to bring money into court. *Ib.*

RECORD.

See BILL OF EXCEPTIONS, 1; INSTRUCTIONS, 3, 5, 6; JUDGMENT, 8; JURISDICTION, 4; MORTGAGE, 6; PLEADING, 10; SPECIAL FINDING, 2; SUMMONS, 1; SUPREME COURT, 16, 17, 28, 33, 39.

REDEMPTION.

See CHATTEL MORTGAGE, 2; MORTGAGE, 7; REAL ESTATE, ACTION TO RECOVER, 1; SHERIFF'S SALE, 1.

RELEASE OF SURETY.

See BOND, 4.

REPLEVIN.

See PLEADING, 3, 6.

1. *Ownership.—Possession.* An action for the recovery of personal property is a possessory action, and a mere possessory right may prevail against an absolute legal title where such title and the right to the possession become separated and are held by different parties. *Entsminger v. Jackson*, 144
2. *Action on Bond.*—It is no defence to an action on a replevin bond, that the amount thereof was less than double the value of the property replevied, although such defect may have been cause for a dismissal of the action of replevin before trial. *Trueblood v. Knox*, 310
3. *Same. Estoppel.—Penalty.*—In a suit upon a replevin bond, the defendant is estopped from setting up the insufficiency of the penalty of such bond as a defence, after the writ of replevin had been issued and the possession of the property obtained upon it. *Ib.*

REPLEVIN BOND.

See PLEADING, 6; REPLEVIN, 2, 3.

REVIVAL OF JUDGMENT.

See JUDGMENT, 1.

SALE.

See DECEDENTS' ESTATES, 1, 10, 11; JUDICIAL SALE; NEGLIGENCE, 3; NOTICE OF SALE; PARTNERSHIP, 4; PARTITION, 1; PLEADING, 4, 5; PROCEEDINGS SUPPLEMENTARY TO EXECUTION, 2, 3; SHERIFF'S SALE.

SCHOOL TOWNSHIP.

See TOWNSHIP TRUSTEE.

SCHOOL TRUSTEES.

See CITIES AND TOWNS, 9.

SHERIFF'S CERTIFICATE.

See JUDICIAL SALE, 3.

SHERIFF'S RETURN.

See SUMMONS, 5.

SHERIFF'S SALE.

See REAL ESTATE, ACTION TO RECOVER, 2.

1. *Deed.—Redemption.*—Where the right of redemption exists, the execution by the sheriff of a deed to land sold on a decree, before the expiration of the year allowed for redemption, will not invalidate such sale. *Rucker v. Steelman, 396*
2. *Failure to Execute Certificate.*—The failure of the sheriff to execute a certificate to the purchaser will not invalidate a sale of real estate made by him. *Ib.*
3. *Evidence.—Title under Sheriff's Sale.*—In an action for the possession of real estate by a plaintiff claiming title by purchase at a sheriff's sale, under a decree of foreclosure, all he is bound to prove is a valid judgment and sale, and the execution of the proper deed; all questions respecting the validity of the mortgage, including the sufficiency of the description, being settled by such decree. *Ib.*
4. *Evidence.—Boundaries.—Possession.*—In such action, where the defendant is in possession of the real estate, and makes defence, proof of the boundaries of the land is immaterial. *Ib.*

SIDEWALK.

See CITIES AND TOWNS, 10, 12, 14; HIGHWAY, 8.

SIGNATURE.

See CIRCUIT COURTS, 2; CRIMINAL LAW, 3.

SLANDER.

1. *Publication.*—Exhibiting a libellous letter and proclaiming its contents, or giving it to others to read, constitute a publication. *McCallister v. Mount, 559*
2. *Same.—Proof of Set of Words.—Identity of Person Slandered.—Variance.*—Only the identical words charged as slanderous need be proved, a variance in name being immaterial. *Ib.*
3. *Same.—New Trial.—Proof of Publication.*—That the libel was read in evidence without proof of its publication, is not ground for a new trial. *Ib.*

SPECIAL DAMAGE.

See FALSE IMPRISONMENT, 7.

SPECIAL FINDING.

See SUPREME COURT, 37.

1. *Verdict.—What Facts Found.—Practice.*—It is not the office of a special verdict or finding to find expressly upon the issues, but only to find the facts proven within the issues. *Ex Parte Walls, 95*

2. *Venire De Novo.—Record.*—If the special finding or verdict is silent in reference to any fact or issue, such silence is not an omission apparent on the record, constituting ground for granting a *venire de novo*. *Ib.*

SPECIFIC PERFORMANCE.

See MARRIED WOMAN, 3.

1. *Contract to Open Street.*—A suit to compel specific performance of a written agreement to open a public street in an addition to a town is not the proper proceeding to remove an obstruction in such street. *Mather v. Simonton, 595*
2. *Same.—Complaint.—Special Injury.—Separate Right of Action.*—The facts and circumstances showing the nature and extent of a special injury, which gives a separate right of action under a contract, ought to be stated in the complaint. *Ib.*
3. *Same.—Jurisdiction.*—The jurisdiction of a court to compel specific performance of contracts exists only when injury is shown, and when it appears also that a remedy at law by compensation in damages would not be adequate. *Ib.*

STATUTE CONSTRUED.

See ATTORNEY, 1; CITIES AND TOWNS, 1; COUNTY COMMISSIONERS; CRIMINAL LAW, 7, 11; DESCENTS; DITCHES AND DRAINS, 1, 2; HIGHWAY, 1, 2, 3, 6; HUSBAND AND WIFE, 3, 4; JUDGMENT, 9; JUDICIAL SALE, 1, 5; LIQUOR LAW, 3; MARRIED WOMAN, 1, 3; PROMISSORY NOTE, 13, 22; RAILROAD, 2, 3; SUMMONS, 3; SUPREME COURT, 13, 38; WILL, 8.

STATUTE OF FRAUDS.

See GUARANTY, 2, 3; REAL ESTATE, ACTION TO RECOVER, 1.

1. *Parol Agreement.* A verbal agreement to purchase all the mules which may be bred from a certain jack during a certain season, at the sum of \$46 for each, is within the seventh section of the statute of frauds, and can not be enforced, unless the amount claimed is shown to be less than \$50. *Carpenter v. Galloway, 418*
2. *Same.*—Where a contract affected by the statute of frauds has been put in writing, and afterward orally modified, such modified agreement is within the statute. *Ib.*
3. *Practice.—Answers to Interrogatories.*—As to when answers to special interrogatories will not overturn the general verdict, see opinion. *Ib.*
4. *Same.—Uncertainty. How corrected.—Venire de Novo.*—Where an interrogatory is direct and pertinent, and the answer of the jury is uncertain, it is error for the court to refuse a motion for a *venire de novo*, or, upon request, to require the jury to return a direct and certain answer. *Ib.*
5. *Growing Trees.—Parol Contract of Sale.—Real Estate.—License.—Conveyance.—Parol Reservation.*—A tree growing upon land constitutes a part thereof, and a parol contract for the sale of such a tree passes no title thereto which can be enforced by legal proceedings. Such a contract may amount to a license to enter upon the land, cut down and remove the tree, but the license is one which may be revoked at any time before the tree is cut down; therefore, the reservation by *parol* of a growing tree by the grantor in a conveyance of real estate, by consent of the grantee, with the right to enter thereon and remove such tree after the conveyance is made, constitutes a mere license on the part of the grantee to the grantor to enter upon the land to remove the tree, for the revocation of which no action will lie. *Armstrong v. Lawson, 498*

STATUTE OF LIMITATIONS.

See GUARDIAN AND WARD, 1; JUDGMENT, 1.

STAY OF PROCEEDINGS.

See FORMER ADJUDICATION, 2.

STREET.

See CITIES AND TOWNS, 5 to 8, 11; EVIDENCE, 3; HIGHWAY, 8; NUISANCE, 2, 3; SPECIFIC PERFORMANCE, 1.

SUMMONS.

1. *Default.—Judgment.—Record.*—Where a judgment is rendered by default, unless the record shows that summons was issued and served, the judgment will be reversed on appeal. *Houk v. Barthold, 21*
2. *Appeal in Vacation.—Practice.*—Where an appeal is taken in vacation from an order of a board of county commissioners, summons must be issued and served upon the adverse parties thereto. *Ib.*
3. *When Valid.—Statute Construed.*—Under section 37, 2 R. S. 1876, p. 49, a summons sufficient, in substance, to impart full information that an action has been instituted against the parties designated therein as defendants, is valid. *State v. Davis, 359*
4. *Omission of Seal.—Amendment Nunc Pro Tunc.—Judgment.*—Under section 37, *supra*, a summons is not void because not attested by the seal of the court; and such court has the right to order the clerk to affix the seal *nunc pro tunc* to a summons issued previous to, and returnable at, a former term, after judgment has been entered and after the term has closed. *Ib.*
5. *Right to Set Aside Default and Judgment.—Sheriff's Return.—Collateral Attack.*—In proceedings to obtain an order for a *nunc pro tunc* amendment of a summons by affixing the seal of the court after judgment in an action, the right to have a default and judgment set aside can not be litigated; nor can the sheriff's return to the summons in said action be contradicted in such proceedings. *Ib.*

SUNDAY.

See PROMISSORY NOTE, 23.

SUPERVISOR.

See HIGHWAY, 3.

SUPREME COURT.

See APPEAL; BILL OF EXCEPTIONS, 1; CRIMINAL LAW, 10; DITCHES AND DRAINS, 4; INSTRUCTIONS, 3 to 5; JURISDICTION, 4; JUROR, 3; LIQUOR LAW, 1, 5; NAMES; PARTITION, 4; PRACTICE, 1, 5, 6, 8, 10, 11, 16, 17; REAL ESTATE, ACTION TO RECOVER, 2; RECEIVER, 3.

1. *Credibility of Witnesses.—Presumption.—Verdict.*—The Supreme Court can not judge of the credibility of witnesses, and will presume that the verdict is right, where the evidence, though conflicting tends to support it. *Toney v. Toney, 34*
2. *Practice.*—There are cases in which trial courts ought to set aside the verdict of juries; but, if they do not discharge such responsibility, the Supreme Court will not review their action. *Ib.*
3. *Practice.—Assignment of Errors.* An assignment of error, that "the court erred in overruling appellants' several demurrers to the complaint," is sufficient. *Stevens v. Tucker, 73*
4. *Complaint.*—An assignment of error, that the complaint does not state facts sufficient to constitute a cause of action, brings in question the sufficiency of the complaint in all respects not cured by the verdict. *Ib.*
5. *Conflicting Evidence.*—Where the evidence is conflicting, the Supreme Court will not review the decision of the trial court. *Sohn v. Marion, etc., Gravel R. Co., 77*

6. *Practice.—Misconduct of Juror.—Bill of Exceptions.*—Affidavits concerning alleged misconduct of jurors must be made a part of the record by a bill of exceptions or order of court, to present any question thereon in the Supreme Court. *Elbert v. Hoby, 111*
7. *Practice.—Assignment of Error.—Complaint.*—Under section 54 of the code, the sufficiency of the complaint, as an entirety, may be called in question for the first time in the Supreme Court by a proper assignment of error; but an assignment that either or any paragraph of complaint does not state facts sufficient to constitute a cause of action is insufficient. *Wagner v. Wagner, 155*
8. *Weight of Evidence.*—The Supreme Court will not disturb a finding where there was evidence, though conflicting, tending to sustain it as to all the points in issue. *Kelly v. Northington, 152*
9. *Elections.—Judicial Knowledge.*—The Supreme Court takes judicial knowledge of the time of holding general elections. *Urmston v. State, ex rel., 175*
10. *Practice.—Motion to Strike Out Surplusage.*—The Supreme Court will not reverse a case for an erroneous ruling upon a motion to strike out mere surplusage in a pleading. *Owen v. Phillips, 284*
11. *Evidence. New Trial.* In order to make the admission of irrelevant testimony available as error, on appeal to the Supreme Court, objection thereto should be made at the trial, exception taken to the overruling thereof, and such ruling assigned as cause in a motion for a new trial. *Ib.*
12. *Evidence. - Presumption.*—Where the record fails to disclose the object or purpose for which excluded evidence was offered, the Supreme Court will presume, in favor of the ruling of the court below, that it was properly excluded. *Watson Coal, etc., Co. v. Casteel, 296*
13. *Practice.—Questions Reserved.—Statute Construed.*—Under sections 347 and 348 of the code, only questions of law decided by the trial court can be reserved for appeal to the Supreme Court. *Fouty v. Morrison, 333*
14. *Same.—Bill of Exceptions Must Contain all the Evidence.*—The Supreme Court will not reverse a judgment upon any question as to the weight or sufficiency of the evidence, where the bill of exceptions fails to show that it contains all the evidence produced at the trial. *Ib.*
15. *Assignment of Error.*—Where no objection is made, or exception taken, to a judgment, and no motion is made for the taxation of costs, in the court below, no question in relation thereto can be raised in the Supreme Court. *Baldwin v. School City of Logansport, 346*
16. *Promissory Note. Pleading.—Exhibit.—Record.—Evidence. - Presumption.*—Where, in an action on a promissory note, the record, on appeal to the Supreme Court, shows that the complaint alleged that the note and endorsement were filed with the complaint, and copies thereof follow the complaint in such record, it will be presumed that the clerk properly discharged his duty in making up the record, and its recitals, therefore, are *prima facie* evidence that the note and endorsement were filed with the complaint. *Hill v. Mayo, 357*
17. *Practice.—Appeal.—Record.—Complaint.*—Where the record shows that an amended complaint was filed in the court below, but such amended complaint is nowhere found in the record, no question thereon is presented on appeal to the Supreme Court. *Chisham v. Way, 362*
18. *Evidence.—Verdict of Jury.*—Where there was evidence before the jury tending to sustain the verdict, the Supreme Court will not disturb it. *City of Lafayette v. Larson, 367*

19. *Assignment of Error.—Waiver.*—A failure to discuss an assignment of error is a waiver thereof. *O. & M. R. W. Co. v. Nickless, 382*
20. *Practice.—Bill of Exceptions.*—Where the bill of exceptions does not contain all the evidence given on the trial, the Supreme Court will not consider the sufficiency of the evidence to sustain the verdict. *Ib.*
21. *Same. Instructions.*—If the instructions given were correct under any supposable state of the evidence, under the issues, the evidence not being in the record, the case will not be reversed. *Ib.*
22. *Practice.—Appeal.—Assignment of Errors.*—The fact that the assignment of errors, on appeal to the Supreme Court, does not contain the names of all the parties, is not sufficient ground for the dismissal of the appeal, unless harm is shown to have been done the adverse party. *Hadley v. Hill, 442*
23. *Same.—Brief.*—The failure of the appellant to file a copy of his brief is not a sufficient cause for dismissal of the appeal. *Ib.*
24. *Same.—Supersedeas.—Transcript.*—A failure to file the transcript in the Supreme Court, within sixty days after filing the appeal bond, does not lose to the party his right of appeal, but upon such failure the bond ceases to operate as a supersedeas. *Ib.*
25. *Co-Parties.*—The word “co-parties,” as used in section 551 of the code, means parties to the judgment appealed from, and not co-plaintiffs or co-defendants to the action. *Ib.*
26. *Practice.—Exception.—Demurrer.*—Where the record on appeal fails to show any exception to the ruling on a demurrer, questions arising thereon will not be considered by the Supreme Court. *Brownlee v. Goldthait, 481*
27. *Appeal.—Practice.—Notice to Co-Party.*—Where one of several defendants appeals to the Supreme Court without giving notice thereof to his co-defendants, as required by section 551 of the code, the appeal will be dismissed. *Hendricks v. State, ex rel., 482*
28. *Practice.—New Trial.—Record.—Presumption.*—Where the written motion and causes for a new trial are not set forth in the record, the Supreme Court will presume, on appeal, that such motion was properly overruled. *Kissell v. Anderson, 485*
29. *Same.—Judgment.*—Objections to the form or substance of a judgment, in whole or in part, can not be made for the first time in the Supreme Court. *Ib.*
30. *Same. - New Trial.*—That the finding is not sustained by sufficient evidence, is a proper cause for a new trial, and can not be complained of as error, for the first time, in the Supreme Court. *Ib.*
31. *Same.—Proceedings Supplementary to Execution.*—Trials, either of law or of fact, may be had in proceedings supplementary to execution, and error occurring therein must be saved and presented in and by the record, on appeal to the Supreme Court, in the same manner as in other civil actions. *Ib.*
32. *Practice.—Appeal.—Sufficiency of Complaint.—Assignment of Error.*—The sufficiency of the facts averred in a complaint, as a whole, may be questioned in the Supreme Court for the first time, and an assignment of error, that “neither paragraph of the complaint states facts sufficient to constitute a cause of action, when separately considered,” is a proper assignment of error. *Higgins v. Kendall, 522*
33. *Practice.—Record.*—Where the only error assigned is upon the overruling of a motion for a new trial, and the evidence is not in the record, but there is a bill of exceptions therein showing the instructions given by the court, both oral and written, but not showing that

any exception was taken at the time to the giving of either, no question is presented for the decision of the Supreme Court.

Howard v. State, 528

34. *Weight of Evidence.—Finding.*—The Supreme Court will not disturb a finding on the mere weight of evidence, where the evidence tends to support it. *Palmer v. Glover, 529*
35. *Practice.—Complaint.*—An assignment of error in the Supreme Court for insufficiency of facts, which questions less than the entire complaint is insufficient. *McCallister v. Mount, 559*
36. *Same.—Assignment of Error Must be Specific.*—An assignment questioning the entire complaint should contain at least one of the objections for which alone error can be assigned in the Supreme Court. *Ib.*
37. *Same.—Special Findings.—General Verdict.*—The court will not presume anything in aid of the special findings, but will indulge every reasonable presumption in favor of the general verdict. *Ib.*
38. *Practice. - Transcript.—Statute Construed.*—The phrase in section 559 of the code, "all papers pertaining to a cause, and filed therein," embraces the complaint, answer, reply, demurrers, and all instruments upon which the proceeding is based, and which are filed with and made part of such proceeding. *Heizer v. Kelly, 582*
39. *Same.—Record on Appeal.*—Under section 556 of the code, where the question arises upon sustaining or overruling a demurrer to the complaint, the record on appeal need not contain any subsequent pleading; but if the question arises upon sustaining or overruling a demurrer to the reply, then the complaint, answer and reply must be embraced in the record. *Ib.*
40. *Same.—Transcript.—Complaint.*—It is necessary, in every case, for the transcript on appeal to the Supreme Court, to contain a copy of the complaint where the question arises upon the pleadings, unless reserved under section 347 of the code, to present such question for the consideration of the Supreme Court. *Ib.*

SURFACE WATER.

See DAMAGE, 4.

TAX.

See RAILROAD.

TIME.

Meaning of Term "Year" in Contracts.—The term "year" does not necessarily mean the period commencing with the 1st day of January and ending with the 31st day of the succeeding December; but its meaning is to be determined from the subject-matter of the contract and the connection in which it is used, and which will carry into effect the intention of the parties. *Knodel v. Baldrige, 54*

TOWN.

See CITIES AND TOWNS.

TOWNSHIP TRUSTEE.

See HIGHWAY, 6.

School Township.—Borrowed Money.—Contract.—Where money is loaned to a township trustee for the purpose of completing a needed and suitable school-house, the trustee not then having funds on hands to finish the same, and the money is applied to such purpose, the school township represented by such trustee, and receiving the benefit of said money, is liable therefor. *Bicknell v. Widner School Township, 501*

TRANSCRIPT.

See SUPREME COURT, 24, 38, 40.

TRANSCRIPT OF JUDGMENT.

See JUDGMENT, 2.

TRESPASS.

See FALSE IMPRISONMENT, 1, 3.

TRESPASSER, LIABILITY OF.

See FALSE IMPRISONMENT, 3.

TRUST.

See MECHANIC'S LIEN, 6.

TRUSTEE.

See PARTITION, 3.

VACATING SALE.

See DECEDENTS' ESTATES, 1.

VARIANCE.

See CRIMINAL LAW, 13; PLEADING, 10, 18; SLANDER, 2.

1. *Trial.—Proof.*—When a variance between the allegations of the complaint and the proof misleads no one, it will be regarded as immaterial. *City of Huntington v. Mendenhall*, 460
2. *Evidence.—Complaint.*—If the evidence shows a wholly different state of facts from that alleged in the complaint, the variance is fatal, and the action can not be maintained. *Ib.*

VENDOR'S LIEN.

Rights of subsequent Purchaser Who has not Paid all of Purchase-Money.—A vendor may enforce his lien against a subsequent purchaser with notice of the lien, or against one without notice, to the extent of the purchase price unpaid by him at the time he receives notice of the vendor's claim. *Higgins v. Kendall*, 522

VENIRE.

See CRIMINAL LAW, 11.

VENIRE DE NOVO.

See FALSE IMPRISONMENT, 3; SPECIAL FINDING, 2; STATUTE OF FRAUDS, 4.

New Trial.—If there was proof pertinent to any issue, on which the court ought to have found facts which are not found, the remedy is by motion for a new trial, on the ground that the finding is contrary to law, but not for a *venire de novo*. *Ex Parte Walls*, 95

VERDICT.

See DAMAGES, 3, 6; FALSE IMPRISONMENT, 3; FORMER ADJUDICATION, 2; LIQUOR LAW, 1; PLEADING, 21; PRACTICE, 4, 5, 11; SPECIAL FINDING, 1; SUPREME COURT, 1, 18, 37.

VESTED RIGHT.

See DECEDENTS' ESTATES, 2.

VOLUNTARY ASSIGNMENT.

See PROCEEDINGS SUPPLEMENTARY TO EXECUTION, 4.

VOLUNTARY CONVEYANCE.

See FRAUDULENT CONVEYANCE, 1 to 3.

WAIVER.

See PLEADING, 1, 21; SUPREME COURT, 19.

Jurisdiction.—An appearance, to move to have a default set aside upon

the ground of want of notice of an appeal from an order of the board of commissioners, does not waive the right to object to the jurisdiction of the court in which such motion is made. *Houk v. Barthold*, 21

WARRANT.

See FALSE IMPRISONMENT, 4.

WASTE.

See LIFE-ESTATE, 1.

WATERCOURSE.

See DAMAGES, 4.

WEIGHT OF EVIDENCE.

See SUPREME COURT, 8, 34.

WIDOW.

See HUSBAND AND WIFE, 1 to 3; MARRIED WOMAN, 2; PARTITION, 3; WILL, 7.

WILL.

1. *Evidence*.—Extrinsic evidence is not admissible to alter, detract from or add to the terms of a will; nor is parol evidence admissible to correct a supposed mistake in a will. *Bunnell v. Bunnell*, 163
2. *Purchase of Legatee's Interest.—Agreement*.—Parol evidence of an agreement to purchase the interest of a legatee in a testator's estate does not tend to contradict or vary the terms of the will, even though such agreement involves a release from an obligation imposed by the will upon such purchaser. *Ib.*
3. *Release of Legacy*.—A legatee may release another from the payment of the legacy, although payment be expressly charged upon the land devised to the person charged with its payment. *Ib.*
4. *Contesting Validity of.—Jurisdiction.—Presumption.—Pleading.—Complaint*.—While it is necessary, in order to give the court jurisdiction of an action to contest the validity of a will, that the testator must have died in, or left assets in, or assets of the estate must have come into, the county where such contest is made, yet, where the court is one of general jurisdiction, like the circuit court, the facts which give it jurisdiction of the subject of the action need not affirmatively appear on the face of the complaint, and its jurisdiction will be presumed unless the contrary appears. *Lee v. Templeton*, 315
5. *Legatee*.—Where one receives a legacy under a will, he can not contest the validity of the will without restoring the legacy, or bringing the money into court. *Ib.*
6. *Estoppel.—Partition*.—Where a devisee under a will joins in a suit for partition of lands devised by such will, claiming an interest therein as devisee, and is defeated in such suit, he is not thereby estopped to afterward contest the validity of such will on account of the mental unsoundness of the testator, if, at the time of the proceedings in partition, he had no notice of the mental unsoundness of the testator at the time of the execution of the will. *Ib.*
7. *Descents.—Heirship.—When Widow of Testator Deemed an Heir.—Limitation*.—A widow is to be deemed an heir of her deceased husband as to her inheritance of his lands under the statute of descents; but, when she claims as an heir under his will, the question whether she is such heir or not depends upon the intention of the testator, as gathered from the will alone; and where a will, after providing in terms for such widow during her widowhood, contained the further provision: "I also order that when my beloved wife * * * ceases to

be my widow, and my youngest children come of age, all my real estate be divided equally among all my heirs." the words "all my heirs" must be construed as meaning only the children of the testator and their descendants, and not such widow. *Brown v. Harmon*, 412

8. *Devise of Fee, with Power of Disposition.—Statute Construed.*—The following clause in a will, "I give to my beloved wife, S. D., and to our heir, S. A. D., all my estate, both real and personal, in their own right, with full power to sell and convey the whole or any part thereof, for the payment of debts or otherwise, as they shall think proper." under the act of 1843, respecting wills. R. S. 1843, p. 485, gave the devisees a fee simple in the lands devised, including the right of disposition. *Chase v. Salisbury*, 506

WITNESS.

See EVIDENCE, 1, 2; HUSBAND AND WIFE, 3, 4; SUPREME COURT, 1.

1. *Impeachment.—Evidence.* A witness can not be impeached by proof or suggestion that he has been indicted for any offence. *Canada v. Curry*, 246
2. *Rights of Judge and Jury.—Instruction.—Practice.*—Whether a witness has sworn to one thing or another, whether his testimony is in conflict with that of another witness, and whether the testimony of conflicting witnesses is corroborated on one or both sides or not, are questions of fact for the jury. The court has no right to state to the jury what is true in fact, but only what is pertinent and true in law. *Ib.*
3. *Credibility.*—The jury has the right, if they deem it proper, to credit the unsupported testimony of a witness over that of another, though corroborated. *Ib.*
4. *Husband and Wife.*—Where a husband and wife sue or are sued jointly, and have separate interests, each is a competent witness. *City of Lafayette v. Larson*, 367
5. *Impeachment cf.—Contradictory Statements.—Evidence.*—While it is necessary, in laying the foundation for impeaching a witness by proof of contradictory statements, that the time, place and persons present shall be given, it is not necessary that the impeaching witness, when called, should be able to swear to the exact date. It is enough if it appear that the impeaching witness is about to speak in reference to the same declaration or conversation to which the attention of the principal witness has been called. *Lawler v. McPheeters*, 577

WRITTEN INSTRUMENT.

See PLEADING, 15, 18.

YEAR.

See TIME.

END OF VOL. 73.

E. J. A. A.

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